No. 74-521

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,

CARLA A. HILLS,
Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of Rogers C.B. Morton, Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case, denying judicial enforcement of civil penalties assessed against the respondent coal mine operators for violations of the safety standards of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.*

OPINIONS BELOW

The opinion of the court of appeals, as amended (App. A, *infra*, pp. 1a-16a) is reported at 495 F. 2d

38.[1] The opinion of the district court (App. D, *infra*, pp. 21a-24a) is not reported.[2]

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 17a-18a) was entered on March 20, 1974. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on June 4, 1974 (App. C, *infra*, pp. 19a-20a). On August 23, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to make a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has waived his right to an administrative hearing.

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[1] The court of appeals opinion of March 20, 1974, was amended on June 12, 1974. The amendment corrected a statement in the original opinion respecting the issuance by the Secretary of substantive guidelines for assessing civil penalties (App. A, *infra*, p. 12a).

[2] Three separate enforcement proceedings were consolidated in the court of appeals. The district court opinion in *Morton* v. *G.M.W. Coal Company*, Civ. No. 72-890, is reprinted in App. D. The district court orders in *Morton* v. *Delta Mining, Inc.*, Civ. No. 72-857, and *Morton* v. *Edward Mears*, Civ. No. 72-928, the two other consolidated cases, granted the operators' motions for summary judgments for the reasons stated in the *G.M.W.* opinion.

2. Whether, in light of the availability of *de novo* judicial review, the absence of detailed findings of fact in the administrative proceedings is fatal to the Secretary's action to enforce the penalties assessed.

STATUTES AND REGULATIONS INVOLVED

1. Section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756, 30 U.S.C. 819(a)(1), provides:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Section 109(a)(3) of the Act, 83 Stat. 757, 30 U.S.C. 819(a)(3), provides:

> A civil penalty shall be assessed by the Secretary only after the person charged with a viola-

tion under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

Section 109(a)(4) of the Act, 83 Stat. 757, 30 U.S.C. 819(a)(4), provides in pertinent part:

If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. * * * The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's

findings, the court shall determine the amount of the penalty to be imposed. * * *

2. 30 C.F.R. Pt. 100, as promulgated on January 16, 1971 (36 F.R. 779-780), is reproduced in App. E, *infra*, pp. 25a-32a. This is the regulation under which the penalties in this case were assessed.

30 C.F.R. Pt. 100, as reissued effective August 1, 1974 (39 F.R. 27558-27561), is reproduced in App. F, *infra*, pp. 33a-56a. This is the regulation now in effect.

STATEMENT

1. *The statutory scheme.* The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.* ("the Act"), establishes health and safety standards to protect the Nation's coal miners and requires each operator of a coal mine and every miner to comply with such standards. Sections 2(g)(1) and 2(g)(2) of the Act, 30 U.S.C. 801(g)(1) and (2).[3] The Act requires the Secretary of the Interior to assess and collect civil penalties for violations of these standards by coal mine operators and miners.[4]

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[3] The health and safety standards are set forth in Titles II and III of the Act, 30 U.S.C. 841, 861, *et seq.* The implementing regulations are in 30 C.F.R. Pts. 70, 75 and 77.

[4] The Act was passed after extensive Congressional hearings into the problems of coal mine health and safety, occasioned by a coal mine disaster at Farmington, West Virginia, in November 1968 that killed 78 miners. The House Report stated: "For too long the Congress has countenanced the passage of piecemeal measures which have failed to provide the Bureau with the enforcement power it needs. Too many injuries and too many lives have filled the gap left by inade-

Section 109(a)(1) of the Act provides that coal mine operators shall be subject to a civil penalty not exceeding $10,000 for each violation of a mandatory health or safety standard. In determining the amount of the penalty, the Secretary is required to consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 819(a)(1).

Section 109(a)(3) of the Act states: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did

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quate laws. A strong law is necessary to protect the men who extract one of our Nation's most vital resources. Coal miners deserve the safest, healthiest work environment our technology will enable us to provide." H. Rep. No. 91-563, 91st Cong., 1st Sess. 6; Leg. Hist. 558, 563. The penalty provisions of Section 109 were enacted as one of the chief enforcement tools of the Act. S. Rep. No. 91-411, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39.

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (cited herein as "Leg. Hist.").

occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid." 30 U.S.C. 819(a)(3).

If the penalty is not paid, the Secretary must file a petition for judicial enforcement of the order in the district court of the district where the mine is located. The court then determines all relevant issues *de novo*, and the operator has a right to a jury trial on any disputed issues of fact. 30 U.S.C. 819(a)(4).[5]

2. *Initial proceedings below.* Pursuant to Section 109(a)(4) of the Act, the Secretary brought separate actions in the district court to enforce unpaid civil penalty assessments against the respondents for violations of the safety standards of the Act and the regulations promulgated thereunder.[6] The administrative assessment orders were attached to the complaints in each case. Each order recited the particular notices of violation on which the penalty assess-

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[5] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act." 30 U.S.C. 819(a)(4). Section 106 authorizes limited judicial review of determinations of the Secretary under Section 105 of the Act, including the validity of withdrawal orders and abatement periods for notices of violation. There were no such issues in the instant cases, since there had been no prior proceedings under either Sections 105 or 106 of the Act.

[6] The penalties assessed against respondents were: $375 against Delta Mining, Inc.; $5,525 against G.M.W. Coal Company, Inc.; and $2,000 against Edward Mears, *et al.*

ments were based[7] and the administrative penalty assessment for each violation. For example, in the Secretary's complaint against respondent Delta Mining, Inc., the attached order of assessment totalling $375 recited six notices of violation issued to the operator on January 24 and 26, 1972, for violations of specified safety standards, with penalty assessments ranging from $30 to $90 for each violation.[8] The Secretary's complaint against each of the respondents stated that no hearing had been requested and that the penalty assessment had become the final order of the Secretary, but had not been paid; each

[7] A written notice of violation must be promptly issued by the coal mine inspector to the operator when he discovers a violation. Section 104(f), 30 U.S.C. 814(f). It must contain "a detailed description of the condition or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard * * *." Section 104(e), 30 U.S.C. 814(e).

[8] In the final orders of assessment in each case, the Assessment Officer certified: "I hereby find that the violations cited in the proposed order of assessment dated [date] did, in fact, occur and accordingly adopt the assessment set forth therein as final." The proposed order in each case stated in relevant part: "[C]onsideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged: it is hereby ordered that [name of operator] be and the same is hereby assessed a civil penalty in the amount of [amount] for the following violation: [listing of notices of violations, date issued, regulation violated and proposed assessment]."

complaint therefore prayed for judgment in the amount of the assessment order.

Each of the respondent mine operators answered the complaint against it, denying liability; each also moved for summary judgment, contending that the assessment orders were unenforceable because the Secretary had not complied with Section 109(a)(3), since the assessment orders were allegedly not accompanied by findings of fact that a violation had occurred, and that the amount of the penalty was warranted.

The Secretary opposed the respondents' motions, arguing that the requirement in Section 109(a)(3) for a "decision incorporating * * * findings of fact" applied only when the mine operator requested the "public hearing" guaranteed by that Section, and that it had no application in circumstances where, as here, the operator had waived his right to an administrative hearing.[9]

[9] Under the regulations in effect at the time the penalty assessments were made, the Assessment Officer issued proposed assessments in each case after considering the statutory factors, 30 C.F.R. 100.2(a), 100.4(c); App. E, *infra*. Each respondent protested the proposed assessments, whereupon the Assessment Officer reconsidered them, concluded they were correct, and reissued them, 30 C.F.R. 100.4(d), 100.4(g); App. E, *infra*. The respondents could then have obtained a formal hearing on the assessments by a timely request, 30 C.F.R. 100.4(h), App. E, *infra*. At that hearing, the agency would have had the burden of proof, and the administrative law judge would have rendered a decision incorporating findings of fact, 30 C.F.R. 100.4(i), App. E, *infra*; 43 C.F.R. 4.587, 4.593. Since no such hearing was requested, the proposed order became the final order of the Secretary. 30 C.F.R. 100.4(h), App. E, *infra*.

3. *District court decisions.* On March 15, 1973, while these cases were before the district court, the United States District Court for the District of Columbia enjoined the Secretary of the Interior from utilizing or enforcing the preliminary assessment procedures of Part 100, concluding that Section 109 (a)(3) of the Act requires the Secretary to incorporate findings of fact in all penalty assessment determinations, whether or not a hearing is requested. *National Independent Coal Operators Association* v. *Morton*, 357 F. Supp. 509 (hereafter referred to as the "*NICOA*" case). As a result of this injunction, the Secretary suspended Part 100 on April 24, 1973, and replaced it with interim formal hearing procedures for all cases, pending an appeal of the NICOA decision (38 Fed. Reg. 10085).[10]

On May 25, and June 28, 1973, the district court in the instant enforcement actions granted summary judgment to the respondent mine operators (see Apps. B and D, *infra*).[11] Agreeing with the district court's decision in *NICOA*, the court concluded that the penalty assessment orders sought to be enforced did not comply with the requirements of Section 109(a)(3) of the Act, since they did not contain findings of fact.

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[10] Although some modifications had been made in the Part 100 procedures in June 1972 (37 Fed. Reg. 11861-11862), the procedures enjoined in *NICOA* were substantially the same in all material respects as those under which the respondents' penalties were assessed.

[11] See note 2, *supra*.

4. *Appellate decisions.* The Secretary appealed the judgments in both circuits, arguing that Section 109(a)(3) requires a decision incorporating findings of fact only where the operator requests formal adjudication, and that, in any event, the availability of *de novo* judicial review in the Secretary's enforcement action cures any shortcomings of this sort in the administrative procedures.

On February 11, 1974, the District of Columbia Circuit reversed the district court's decision in *NICOA*, concluding that Section 109(a)(3) "does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication." *National Independent Coal Operator's Association* v. *Morton*, 494 F.2d 987, 994 (C.A.D.C.) (App. G, *infra*, pp. 57a-73a, 73a).[12]

The decision of the District of Columbia Circuit in *NICOA* was brought to the attention of the Third Circuit, but that court declined to follow it. In its decision of March 20, 1974, the Third Circuit held

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[12] *NICOA's* petition for rehearing was denied on April 24, 1974, and the mandate of the court of appeals issued on May 8, 1974.

NICOA has filed a petition for a writ of certiorari in that case, No. 73-2066. We are opposing that petition, since that case, unlike the instant one, involves no controversy of continuing importance meriting review by this Court. The regulations enjoined by the district court in that case have been extensively revised. The validity of the prior regulations has current significance only in the context of pending enforcement actions, as in the instant case. There can be no enforcement actions in the District of Columbia, since there are no coal mines there.

that the plain language of Section 109(a)(3) requires the Secretary to accompany each final assessment order with a decision incorporating findings of fact regarding the determination of the amount of the penalty,[13] "whether or not the operator requests a hearing" (App. A, *infra*, p. 9a). The court recognized the Secretary's concern "that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions"; it nevertheless concluded that it would be inappropriate "to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act" (*id.* at 13a).

In a footnote, the court of appeals stated that it had "considered and rejected" the Secretary's alternative argument that the *de novo* enforcement procedure in the district court cured any defects in the

[13] The court stated that the final decision of the Secretary "must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty" (App. A, *infra*, p. 16a). However, the court's discussion of the issues was entirely confined to the manner of determining the amount of the penalty, and there was no discussion of the sufficiency of the old Part 100 procedures with respect to the finding of the fact of violation. The court did not hold that the findings of fact concerning the existence of the violations were inadequate, and we think it clear that, whether or not such findings are necessary in all cases, they were sufficiently provided under the old Part 100 procedures. Since all assessment orders identify the notices of violation upon which they are based, and those notices contain the specifics of the alleged violation, the findings in those notices constitute sufficient findings of fact to support the conclusion that the violation occurred.

findings of fact accompanying the administrative assessment order (*id.* at 16a n. 32).

5. *Reissuance of Part 100 with substantive assessment guidelines.* A revised Part 100 has been adopted by the Department of the Interior, which became effective on August 1, 1974. This procedure establishes an assessment formula for determining proposed penalties pursuant to Section 109(a)(1) of the Act (App. F, *infra*, pp. 33a-56a). Under this system, all proposed assessments will be accompanied not only by a recitation of the notice of violation [14] and the amount of the penalty, but also by formula determinations ("penalty points") pertaining to each of the six statutory criteria.[15]

REASONS FOR GRANTING THE WRIT

1. Although the procedures disapproved in this case have been substantially revised, the decision below, if unreversed, will significantly interfere with the effective enforcement of the Federal Coal Mine Health and Safety Act. There is a substantial backlog of cases filed or ready for filing in the district courts—more than 2,400 separate actions, involving an estimated 24,000 individual violations—in which

[14] See p. 8, n. 5 *supra*.

[15] Under the reissued Part 100, as in the case of the former Part 100, the operator's failure to request a hearing within a specified time (now 30 days) after service of a proposed assessment order (and opportunity for a conference) will result in a final assessment order enforceable in the district courts. 30 C.F.R. 100.4(c) (App. F, *infra*, p. 51a).

penalties were assessed under the original version of Part 100.[16] In all of these cases the Secretary is seeking enforcement of penalty assessment orders, not accompanied by specific findings relating to the amount of the penalty, that became final under the original Part 100 as a result of the operator's failure to request a hearing.

The Third Circuit has held that these assessment orders are invalid under Section 109(a)(3) of the Act because none of them is accompanied by a decision incorporating findings of fact regarding the determination of the amount of the penalty; and, for this reason, none of them may be enforced in actions in the district courts under Section 109(a)(4) of the Act. Accordingly, none of the 150 cases presently pending in the Third Circuit may proceed to trial or resolution, but each must be abandoned or commenced anew in administrative proceedings in which the kind of decision and findings called for by the Third Circuit are made.

The fate of the cases pending in the other circuits is unclear. Neither the Fourth nor the Sixth Circuits, where most cases are pending or would be brought, has spoken to the issue. The District of Columbia Circuit held in *NICOA* that the original Part 100 procedures were valid, since the Act does not require a formal decision with findings of fact when an operator fails to request a hearing. Although no enforcement proceedings can be brought in the District of Columbia (since no coal mines are located there), the split in the circuits concerning the validity of the procedures under which the outstanding penalty assessments were made leaves the Secretary, the mine operators, and the district courts in other circuits in doubt as to how they should proceed in regard to the pending enforcement proceedings.

[16] That is, the version originally issued in 1971 which was modified in 1972 and suspended in 1973. See note 10, *supra*.

The Secretary could of course reassess the penalties in all the pending district court cases, utilizing the procedures of the new Part 100.[17] Although we believe that the penalty determinations reached in applying the new Part 100 constitute sufficient "findings of fact" to meet the Third Circuit's requirement, a large section of the industry does not share this position.[18] Thus, further litigation on the matter could be expected even if the penalties in all of the 2,400 pending district court cases were reassessed under the new Part 100.

More significantly, to reassess all of these cases (involving an estimated 24,000 individual violations occurring some 2 to 4 years ago) would be a staggering task and would severely hamper the Interior Department's effort to keep up with current violations and assessments, a program already suffering

[17] The Secretary does not consider that he has any power under Section 109(a) of the Act to abandon these assessments, and, in any event, does not consider that abandonment would be consistent with the purposes and policy of the Act.

[18] See the comment of the *National Independent Coal Operator's Association* respecting the new Part 100 (App. F, *infra*, p. 38a).

from unacceptable delays and backlogs. And, of course, if the courts should ultimately reject the revised procedures, this monumental task would have been undertaken in vain.

Uncertainty concerning the validity of the original Part 100 procedures, and even the revised ones, has a further practical adverse effect on the agency's enforcement of the Act. About 80,000 violations of the Act are discovered each year; a penalty must be assessed for each one. Therefore, it is clearly essential that most cases be settled by voluntary payments or settlements with the operator. But the uncertainty concerning the validity of the procedures significantly affects the mine operator's willingness to make such payments or settlements. Since the imposition of civil penalties is one of the major means adopted by Congress to encourage mine operators to improve safety and working conditions in the Nation's coal mines, disruption of the administrative enforcement procedure arising from the need to redetermine a vast number of past cases, combined with uncertainty about the procedural requirements of the Act, jeopardizes the accomplishment of the congressional goals.[19]

[19] Moreover, since no hearings were requested in any of the more than 2,400 pending cases, the operator's refusal to pay the assessed penalty is unlikely as a practical matter to be based upon any desire to contest the occurrence of the violation or the amount of the penalty. Instead, the basic issue in most of these cases is likely to be the validity of the administrative procedures upon which the final orders were based. Thus, resolution of that issue by this Court will probably avoid the necessity for further litigation in most of those cases.

Accordingly, a prompt determination by this Court of the validity of the original agency procedures will substantially contribute to the effective enforcement of the Act, the prime purpose of which—the health and safety of the Nation's coal miners—Congress declared a matter of first priority and concern. 30 U.S.C. 801(a).

This Court has granted certiorari in similar instances, where the impact of a holding on the administration of a federal statute is severe (*e.g.*, *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299) or where it is important to determine the controlling principle for settlement of many claims (*e.g.*, *United States* v. *Powell*, 330 U.S. 238, 240; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2). This is particularly so where there is a conflict among the circuits on the point, *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U.S. 228, and it is so even where the statutes or regulations in question have since been repealed or modified, see *Alaska* v. *American Can Co.*, 358 U.S. 224, 225.

2. The court below was in error in concluding that Section 109(a)(3) of the Act requires that all penalty assessments must include specific findings of fact. The language of that Section is, we submit, ambiguous.[20] The main thrust of the section is to provide an opportunity for a hearing. The language concerning a "decision * * * incorporating findings

[20] The District of Columbia Circuit recognized in *NICOA* that the provision is "logically capable of two different constructions." App. G, *infra*, p. 64a.

of fact" is sensible only if read as ancillary to the hearing requirement. This reading of the statute was adopted by the court of appeals in *NICOA*,[21] is supported by the legislative history of Section 109 (a)(3),[22] and, as the Third Circuit itself seemed to recognize, avoids a requirement which "may hobble efforts at effective enforcement of the Act's penalty provisions" (App. A, *infra*, p. 13a).[23]

The effective enforcement problem arises from the large number of violations for which penalties must be assessed—about 80,000 a year. But since the penalty for most of these violations is small—about the size of a traffic ticket[24]—summary procedures,

[21] In *NICOA* the court of appeals cited decisions of this Court holding that, even where a statute requires a hearing, no hearing need be afforded where no disputed issue of fact is raised. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39-44. See also *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620-622. *A fortiori*, no findings of fact are required "where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" (App. G, *infra*, pp. 67a n. 30, 68a).

[22] The legislative history is discussed in detail in the court of appeals' opinion in *NICOA* (App. G, *infra*, pp. 68a-73a).

[23] Any requirement for a *formal* decision with narrative findings of fact in all uncontested cases would certainly hobble efforts at effective enforcement of the penalty provisions of the Act.

[24] The Department of the Interior advises us that in a random sampling of 50 enforcement actions presently pending in the district courts, involving final assessments under the old Part 100 for 484 individual violations, the number and amount of the final assessment for each violation were as follows:

Number of violations	Amount of assessment
207	$25 or less
87	$26 to $50
75	$51 to $100
96	$101 to $500
5	$501 to $1,000
3	$1,000 to $2,000
11	Over $2,000
484	

similar to those widely used for violations of Motor Vehicle Codes, are appropriate. In both circumstances, the operator is adequately informed of the particular violation involved, either by the traffic ticket or the notice of violation given to the coal mine operator. Both may obtain a hearing if they believe the original enforcement action is arbitrary or erroneous. But if they forego their right to a hearing and to require their accuser to prove his case, they have no real basis for complaint when confronted with an effort to enforce the result reached following their default. Cf. *Farncomb* v. *Denver*, 252 U.S. 7, 11-12; *Palmer* v. *McMahon*, 133 U.S. 660, 668-669.

3. In any event, the availability of further *de novo* consideration in the district court, whether or not there has been an administrative hearing, cures any possible defects in the agency procedures.[25]

[25] Under these circumstances, the court below incorrectly concluded that findings of fact would facilitate judicial review. Cf. *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, 178 (C.A. 7) (agency findings are immaterial when judicial review is *de novo*).

The court below cited no reason or authority for its failure to follow the general rule that holds that procedural defects at one level are not fatal where *de novo* review is available at another level. See *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, 178 (C.A. 7); *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281, 290 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

NOVEMBER 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
UNITED STATES DEPARTMENT OF THE INTERIOR

v.

DELTA MINING, INC.

United States of America,
Appellant in No. 73-1752

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
UNITED STATES DEPARTMENT OF THE INTERIOR

v.

G. M. W. COAL COMPANY, INC.

United States of America,
Appellant in No. 73-1753

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America,
Appellant in No. 73-1848

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

D.C. Civil Nos. 73-857, 72-890, 72-928

Argued January 10, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division

RICHARD I. CHAIFETZ
Attorney
Department of Justice
Washington, D.C.

Of Counsel:

RICHARD L. THORNBURGH
United States Attorney

Attorneys for Appellant

FREDERICK R. BLACKWELL, ESQ.
FRANKLYN E. CONFLENTI, ESQ.
Cauley, Birsic & Conflenti

Attorneys for Delta Mining, Inc. and G. M. W. Coal Company, Inc.,

HAROLD R. SCHMIDT
Rose, Schmidt and Dixon
Attorney for Edward Mears, et al.

OPINION OF THE COURT

(Filed March 20, 1974)

ADAMS, *Circuit Judge*

The question on this appeal is whether, under the Federal Coal Mine Health and Safety Act,[1] the Secretary of Interior may assess civil penalties against mine operators without making and publishing factual findings. The district court, in which the Secretary sought enforcement of assessment orders against the defendant mining companies,[2] held that the orders were invalid because of the absence of such findings, and the Secretary appealed.

The Act was passed in 1969 to "protect the health and safety of the Nation's coal miners." [2a] At various times during 1971, inspectors of the Bureau of Mines, Department of Interior, entered and inspected the coal mines operated by the various defendants, seeking to determine the extent of compliance or non-compliance with the Act, and with the regulations promulgated thereunder.[3] During the course of these visits the inspectors detected a number of violations

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[1] 30 U.S.C. §§ 801 *et seq.*

[2] Separate enforcement proceedings were brought against G.M.&W. Coal Co., Inc., Delta Mining, Inc. and Edward Mears, d/b/a M. Y. Coal Company. The cases involve identical issues, and so the appeals were consolidated in this court. The several apellee coal companies are referred to herein collectively, as "defendants."

[2a] 30 U.S.C. § 801(g)(1).

[3] 30 C.F.R., Ch. 1, subch. 0.

of the Act or the regulations. In each such instance, an inspector served the defendant in question with a notice of the infraction. Each notice stated that the particular violation had to be abated by a certain date. On the date set for abatement, the inspector returned to the mine and, upon determining that the violations had in fact been abated, furnished the defendant with a notice to that effect.

After the abatement of each violation and the notification of the defendant involved, the local office of the Bureau of Mines sent copies of the notices of violation and abatement to the Bureau's central office in Washington, D.C. There an Assessment Officer reviewed the various notices and sent proposed penalty assessment orders to the defendants.[4]

The proposed penalty assessment orders informed each defendant that the Assessment Officer, after giving "due consideration" to certain statutory criteria, intended to assess civil penalties in various amounts; that the defendants could protest the assessments in writing; and that the defendants had a right, secured by statute, to request hearings. Each defendant protested the orders.[5] However, the

[4] In most instances, the Assessment Officer consolidated several violations into one proposed penalty assessment order.

[5] When a protest is made to a proposed order, the Assessment Officer may either vacate, modify or affirm the proposed order. If the proposed order is vacated, the proceeding ends there; if it is modified or affirmed, the violator has the right to seek a hearing, which is held at a location as near as possible to the coal mine involved.

Assessment Officer did not consider that a reduction in the size of the penalties was called for, and he accordingly notified the defendants of his affirmance of the proposed orders.

The defendants were also notified, upon affirmance of the proposed orders, that they had 15 days in which to request a hearing, and that upon their failure to do so within the prescribed time the proposed orders would become the final orders of the Secretary. No hearings were requested and the final orders of the Secretary were entered. When the defendants failed to pay the assessments set forth in the final orders, this action for enforcement was brought in the district court.[6]

Section 109(a)(3) of the Act[7] provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

[6] Section 109(a)(4) of the Act, 30 U.S.C. § 819(a)(4), provides for actions in the district courts to enforce penalty assessment orders.

[7] 30 U.S.C. § 819(a)(3).

Section 109(a)(1)[8] enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The proposed orders of assessment which the defendants received from the Assessment Officer were on preprinted forms which recited, in some instances, that the six factors set out in the statute had been considered.[9] The final orders entered by the Secretary did not mention the six statutory criteria at all, but merely set forth the Secretary's finding that a violation "did, in fact, occur." [10] The defendants contend, and the district court agreed, that in omitting from

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[8] 30 U.S.C. § 819(a)(1).

[9] One proposed order lists, as having been considered, the six criteria of section 109(a)(1). Some of the others state that consideration has been given to "all available information, including the gravity of the violation."

[10] The "finding" that a violation "did in fact, occur,"—which is required under section 109—was originally made by the Assessment Officer. Curiously, the Assessment Officer did not make the finding of violation, in some cases, until several months after the entry of the proposed orders of asessment.

the final orders express findings of fact relating to the statutory criteria for determining the amount of the penalty, and so providing no assurance of any considered application of these criteria, the Secretary failed to satisfy the requirements of section 109(a)(3).

The Secretary counters that the language of that section, requiring a "decision incorporating his findings of fact therein," applies only when a defendant has requested an oral hearing, and that when, as here, the Secretary makes a "decision" without any hearing, it is unnecessary under the statute to include any findings of fact.[11] We reject this contention and affirm the district court's grant of summary judgment in favor of the defendant mine operators.

We note that, in ordering penalty assessments without making express findings, the Secretary was acting pursuant to, and in apparent conformity with, the pertinent Regulations of the Department of Interior.[12]

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[11] The Secretary characterizes the entry of a final order after failure of the violator to request a hearing as a type of "default judgment," and argues that since the operator has willingly forfeited his "day in court," he will not be heard to object to the absence of findings. This reasoning is appealing but, as will be shown, not applicable.

[12] 30 C.F.R. Pt. 100, effective January 14, 1971. The Part 100 Regulations were amended in some small details on June 15, 1972, and were indefinitely suspended on April 24, 1973. *See* 39 Fed. Reg. 10085, 4/24/73. The references in this opinion are to the Regulations in force between January 14, 1971 and June 15, 1972.

Regulation 100.4(h)[13] provides that once a proposed order of assessment has been made, the operator charged shall have 15 days in which to accept such order of the Assessment Officer or to seek a "formal adjudication." Acceptance, or failure to request an adjudication, results under the Regulation in the proposed order becoming "the final assessment order of the Secretary." Thus, the Regulations appear to contemplate the very procedure that was utilized here: a proposed order became final without the Secretary himself making findings on the question of penalty amount.[14] The question before us then, narrows to whether Regulations themselves, as implemented, were consistent with the requirements of the Coal Mine Health and Safety Act.

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[13] 30 C.F.R. § 100.4(b). There are other Interior Regulations (60 C.F.R. § 301.50, now 43 C.F.R. Part 4) dealing with penalty assessments, the relevance or validity of which we do not pass upon here.

[14] It is apparent that the "findings" of the Assessment Officer on the issue of penalty amount, where made, were little more than *pro forma* recitations that the pertinent statutory criteria had been considered. *See* Note 7, *supra*, and accompanying text. In view of the realities of the penalty assessment procedure, we reject the contention that the "findings" as to penalty amount set out in some of the proposed orders were the sort of findings contemplated by section 109. Mere recitation that the statutory criteria for gauging penalty amounts have been given "due consideration" will not convince us "that the agency has . . . really taken a 'hard look' at the salient problems and has . . . genuinely engaged in reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).

As noted above, the Act provides that a civil penalty may be assessed only after the operator "has been given an opportunity for a public hearing." The language of the Act would appear to require also that, whether or not the operator requests a hearing, the assessment *must* be made "by [the Secretary's] decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted." The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of section 109.

Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted.[15] There is not a modicum of evidence in the reports from either House of Congress,[16] nor in the Conference Committee report on the compromise bill that became section 109,[17] that would indicate an intent to dispense with findings of fact where no hearing is requested.

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[15] Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. *See* Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

[16] *See* H. Rep. 91-563, 91st Cong., 1st Sess., and S. Rep. 91-411, 91st Cong., 1st Sess. The documents are included in Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, at pp. 569, 93, respectively.

[17] *See* H. Rep. 91-781, 91st Cong., 1st Sess.

Another consideration, apparent on the face of section 109, tends to indicate that findings are required when a violator does not seek a hearing as well as when he does. When a hearing is requested, the section 109 triggers the application in that proceeding of section 5 of the Administrative Procedure Act [18] which, by incorporating section 8 of the APA,[19] requires that the final decision of the Secretary be accompanied by findings. Thus the language in section 109 itself requiring findings would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held. While duplication and repetition in statutory language are certainly not unheard of, it would seem a salutary rule to avoid reading the terms of a statute as mere surplusage in the absence of some proof that they were so intended. Lacking such proof here, we conclude that Congress intended *every* final assessment order of the Secretary to be accompanied by findings of fact.[20]

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[18] 5 U.S.C. § 554.

[19] 5 U.S.C. § 557.

[20] The Secretary also mounts a semantic argument against the district court's construction of the statute, by asserting that the word "therein" in section 109 refers to the *hearing*, and not to the "decision" of the Secretary. Thus, he claims, when no hearing is held, there can be no "findings of fact therein." Since the word "decision" follows "hearing" in the statute, the most natural and probable referent of "therein" is "decision," not "hearing." Words in statutes ordinarily should be accorded their most common, everyday meanings.

[Footnote continued on page 11a]

Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite.[21] Thus, though flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, "we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion." [22] Judicial review of a final administrative determination is heralded as a right,[23] and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings.[24]

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[20] [Continued]

See, e.g., McBoyle v. United States, 278 U.S. 41, 48 (1928). Nor can we fail to note that section 109 makes a second use of the word "therein," the referent of which is clearly "decision" and not "hearing." *See* text accompanying note 7, *supra*.

[21] *See* Note, *Administrative Findings Under Section 8(B)* [of the APA], 51 Va. L. Rev. 459, 462-64 (1965); K. C. Davis Discretionary Justice, ch. VI (1969).

[22] Environmental Defense Fund, Inc. v. Rucklehaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

[23] *See* PBW Stock Exchange, Inc. v. Securities and Exchange Comm'n, 485 F.2d 718, 750 (3d Cir. 1973) (*dissenting opinion* of Adams, J.).

[24] *See* Environmental Defense Fund, Inc. v. Ruckleshaus, *supra*, 439 F.2d at 598: "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions." *See also* K. C. Davis, *supra*, at 103-106.

Though it might not be beyond Congress' power to provide for the entry by the Secretary of penalty assessment orders without findings of fact, such a provision would run against the grain of much of our administrative jurisprudence. The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such findings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid.[25]

In so holding, we observe that the Bureau of Mines had not, at the time these assessments were made established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines led the Comptroller General, in a report on the Bureau of Mines,[26] to state that:

> "We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in [400] sample cases.
>
> * * * *

[25] As noted in Note 9, *supra*, the Part 100 Regulations have now been indefinitely suspended.

[26] Report by the Comptroller General to the Conservation and Natural Resources Subcommittee, House Committee on Government Operations, entitled "Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969" (July 5, 1972).

> ". . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty." [27]

Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount.

We are in full sympathy with the goals and spirit expressed in the Coal Mine Health and Safety Act, and we have listened with concern to the Secretary's claim that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions. Yet, we do not consider it appropriate to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act. Though the attainment of safe, reasonably healthy conditions in the coal mines is a commendable statutory objective, so too is the assurance that no one, be he miner or coal magnate, be treated arbitrarily or discriminatorily in any administrative proceeding.

Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not wor-

[27] *Id.* at 25-26.

sen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings.

We are aware that, only recently, the District of Columbia Circuit reached a conclusion concerning the Act that is at odds with our holding in this case. In National Independent Coal Operators' Ass'n v. Morton,[28] that court reasoned that "the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed," and that "[w]here no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which

[28] No. 73-1678 (D.C. Cir., Feb. 11, 1974).

merely would consist of the same information already contained in the proposed assessment order." [29]

At least two considerations serve to distinguish the cases before us from that apparently confronting the District of Columbia Circuit in *National Independent*. First, in the cases before us, the defendant operators' failure to request a hearing in no way suggests that the appropriateness of the penalty amount went undisputed. In each instance, the operators lodged protests with the Assessment Officer, indicating that the propriety of the amounts was a hotly contested issue. In these circumstances, we are reluctant to infer from the operators' failure to request hearings that their objections to the penalty amounts suddenly ceased. There are other equally plausible reasons, cost and inconvenience among them, to explain the defendants' failure to seek formal hearings.

Second, a decision by the Secretary which sets out his findings of fact in these cases and thus demonstrates a considered application of the criteria of section 109, would not "consist of the same information already contained in the proposed assessment order." As indicated above, the proposed assessment orders in this case contained *no* "information" other than *pro forma* recitations that the six criteria for determining penalty amount had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet

[29] *Id.*, slip op. at 9.

received, information to which, under our view of the Act, they are entitled.[30]

Thus, at least in the context of these enforcement actions,[31] we adhere to the view that each final decision of the Secretary must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty.[32]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[30] The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior administrative jurisprudence. *See, e.g., Ruckelshaus* and *Greater Boston Television*, supra; D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972); Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Station KFH v. FCC, 247 F.2d 570 (D.C. Cir. 1957).

[31] *National Independent, supra,* involved a suit to enjoin application of the civil penalty assessment procedures embodied in the Pt. 100 Regulations.

[32] We have considered and rejected two other contentions of the Secretary, (1) that the enforcement procedure in the district court cures any defects in the Secretary's final order, and (2) that by failing to object to the lack of findings in any administrative proceeding the defendants have failed to "exhaust administrative remedies," and so are barred from objecting in the courts. In connection with the second contention, we note that once a final order has been entered, there is no opportunity to lodge an objection with the Secretary or Bureau of Mines.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Dept of Interior

vs.

DELTA MINING, INC.

United States of America, Appellant in No. 73-1752
(D.C. Civil Action No. 73-857)

ROGERS C. B. MORTON, Secretary of the Interior,
United States Department of the Interior

vs.

G. M. W. COAL COMPANY, INC.

United States of America, Appellant in No. 73-1753
(D.C. Civil Action No. 72-890)

ROGERS C. B. MORTON, Secretary of the Interior,
United States Dept of the Interior

vs.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, Individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America, Appellant in No. 73-1848
(D.C. Civil Action No. 72-928)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and WEIS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed May 25, 1973, in No. 73-1752 and No. 73-1753, and filed June 28, 1973, in No. 73-1848 be, and the same are hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

March 20, 1974

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1974.

Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Department of the Interior

v.

DELTA MINING, INC., U.S.A. appellant in No. 73-1752

v.

G. M. W. COAL COMPANY, INC.,
U.S.A. appellant in No. 73-1753

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS,
et al.—U.S.A. appellant in No. 73-1848

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: June 4, 1974

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 72-890

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
PLAINTIFF

vs.

G.M.W. COAL COMPANY, INC., DEFENDANT

MEMORANDUM

This action was instituted by Rogers C. B. Morton, Secretary of the Interior, to enforce three civil penalty assessment orders against the defendant, G.M.W. Coal Company, Inc. for alleged violations of the Federal Coal Mines Health & Safety Act (hereinafter referred to as "the Act") pursuant to § 109 (a) (4) of the Act, 30 U.S.C.A. § 819(a) (4). The defendant has filed a Motion for Summary Judgment asserting, inter alia, that the procedures followed by the Secretary in assessing these penalties did not comply with § 109(a) (1) and (3) of the Act, 30 U.S.C.A. § 819(a) (1) and (3).[1]

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[1] Sec. 109 (a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the

It is the contention of the defendant that the Secretary failed to meet the requirements of the Act in that he failed to consider the six factors enumerated in 109(a)(1), 30 U.S.C.A. § 819(a)(1) in determining the amount of the penalty and he failed to incorporate his findings of fact when determining that a violation had in fact occurred as required by § 109(a)(3), 30 U.S.C.A. § 819(a)(3).

In support of this contention the defendant attacks the Proposed Orders of Assessment which it received from the authorized assessment officer. Each of the proposed orders is on a pre-printed form, the most

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Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

detailed of which recites within the form that the six factors enumerated in the statute have been considered, another recites that the gravity of the violation has been considered, and in the third order no mention is made of the factors considered in arriving at a penalty amount.

The finding by the Secretary that a violation had in fact occurred is also on a printed form which states in its entirety, "I hereby find that the violations entered in the ———— proposed order of assessment dated ———— did, in fact, occur and accordingly adopt the assessment set forth therein as final."

As in *National Independent Coal Operators Association, et al.* v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil Action No. 397-72 U.S.D.C., it is clear that the proposed orders of assessment in the case sub judice as well as the final orders based thereon do not set forth "findings of fact" concerning either the occurrence of a violation or the amount of the penalty assessed. The express language of the Act makes it equally clear that an order of assessment must be supported by a "decision, incorporating his (the Secretary's) findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . . ." As did the court in *National Independent Coal Operators Associatoin, et al.*, supra, this court finds that the procedures leading to the orders sought to be enforced in the instant action did not comply with the requirements of sec-

tion 109(a)(1) and (3), 30 U.S.C.A. section 819 (a)(1) and (3).

IT IS ORDERED that the defendant's Motion for Summary Judgment be and the same is hereby granted.

/s/ Herbert P. Sorg
D.J.

Dated: May 25, 1973.

APPENDIX E

RULES AND REGULATIONS

[36 F.R. 779-80]

TITLE 30—MINERAL RESOURCES

CHAPTER I—BUREAU OF MINES, DEPARTMENT OF THE INTERIOR

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

Part 100 — Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173) and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter O of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100, as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maxi-

mum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry, Part 100 shall become effective on the date of its publication in the FEDERAL REGISTER (1-16-71).

FRED J. RUSSELL
Under Secretary of the Interior.

JANUARY 14, 1971

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.

Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of mantaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort [sic] on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*—(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b) (1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15

working days from the date of receipt of the Proposed Order of Assessment to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i)(1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess a penalty with the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000-$10,000
B. Other Withdrawal Orders	$1,000-$5,000
C. Serious Violations	$ 100-$1,000
D. Nonserious Violations	$ 25-$500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$ 25-$250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc. 71-748 Filed 1-15-71; 9:47 a.m.]

APPENDIX F

RULES AND REGULATIONS

[39 F.R. 27558]

Part 100 — Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

REVISION AND REINSTATEMENT OF PROCEDURES FOR INFORMAL ASSESSMENT

There was published in the FEDERAL REGISTER on May 8, 1974 (39 FR 16145-16151) proposed procedures for informal assessment of civil penalties for violations of the Federal Coal Mine Health and Safety Act of 1969. These proposed regulations were preparatory to reinstatement of the informal assessment program contained in Title 30, Code of Federal Regulations, Part 100, which had been suspended on April 24, 1973 (38 FR 10085). This suspension was in effect pending appeal of a decision and order of the United States District Court for the District of Columbia in "National Independent Coal Operators Association, et al. v. Rogers C. B. Morton, Secretary of the Interior, et al.," Civil Action No. 397-72 in which the District Court had declared unlawful the procedures set forth in 30 CFR Part 100. On February 11, 1974, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and upheld the validity of the Department's civil penalties procedures.

Interested persons were given 45 days in which to participate in the rulemaking process through submission of written comments, suggestions or objec-

tions. Comments were received from 12 operators, coal operator associations, legal representatives of operators, and the United Mine Workers of America. These comments have been received and studied and appropriate changes as explained below have been made. The Department expresses its sincere appreciation to those who took the time and care to read and study the proposal and offer their views.

The Bituminous Coal Operators Association as well as several other commenters expressed a strong desire that the regulations permit the operators to submit information prior to the receipt of the order of assessment. After careful consideration of this comment, the Department has decided to provide an opportunity for an operator to submit data concerning a violation within 15 days of its receipt by the operator.

Bethlehem Mines and the Old Ben Company made the comment that only one penalty conversion table should be used for all operators. The Department considered this to be a valid point as the lower penalty conversion tables did not reach a $10,000 maximum. Accordingly, a new penalty conversion table has been substituted for the five tables proposed. This new table, although adapted from Table 1, is somewhat different because it must be taken into account that the table will be applied to large and small operators alike and in addition that points will be added for size rather than deducting a negative percentage as was the case under the proposal. Accordingly, the Department has created a new

schedule 100.3(b)(1) for size of the mine which has a possible total of 10 points.

This change conforms with a comment made by the United Mine Workers that approves the addition formula in general, but suggested that the fines are too low. By elimination of the low tables, violations rated at equal penalty points will be assessed the same amount regardless of size.

Reavis, Pogue, Neal and Rose, a law firm representing several coal companies, Ziegler Coal Company, Peabody Coal Company and several other operators felt that the formula was weighted too heavily on the side of gravity and negligence and further required too much of a subjective evaluation of these criteria. In response to the first comment, the Department has reduced the maximum penalty points for gravity and negligence by 10 and 5 points, respectively. As to the subjective evaluation objection, the Department believes that this is an inherent part of the evaluation of negligence and gravity. The Assessment Office will attempt to be as uniform as possible in evalauting similar violations, however, each violation must be graded on its individual facts and in assessing gravity, one must consider the likely consequences of the violations. To reduce the subjectivity of gravity the categories within each subdivision have been reduced and the point assignment has been modified to a fixed number rather than a range.

The majority of the comments recommended that additional points should be provided for rapid com-

pliance after abatement of a violation. Accordingly, the Department has expanded the possible negative points in this criteria to minus 10. In addition normal compliance will receive no penalty points rather than the additional 5 points which had been originally proposed.

The Central Pennsylvania Coal Producers Association as well as several other coal operators requested that the 20-day time limits be expanded to 30 days in the regulations. This has been adopted where appropriate. Several commenters, including the Plateau Mining Company, are concerned that violations which have been vacated not be considered as part of an operator's previous history. Accordingly, the definition of previous history has been clarified to provide that previous history violations includes only those violations which have not been vacated as of the time of assessment. At the urging of several commenters, the Department has reevaluated its data for previous history and accordingly new tables are utilized in this criteria. The original tables which had been proposed were unduly weighted to consider surface mines and surface facilities of underground mine operators. Finally, § 100.3(i) has been amended to make clear that the formula may be waived in whole or in part in making special assessments. Criteria for making a special assessment will be explained further in the Office of Assessment Manual. These special assessments will be utilized in cases where evaluation of the violations convinces the Assessment Office that the formula would actually im-

pose an unfair penalty or an improperly low one. For example, violations which result in fatalities or have a high potential to cause a disaster might be considered for a special assessment, whereas violations which have unusual mitigating circumstances may also be conducted for a special assessment. A special assessment will be made in a narrative order. The criteria will be applied and explained in a narrative statement. There were several minor comments concerning: (1) Procedures permitting operators who so request to register agents for service of assessments, (2) provisions that statements at conferences not be used against the operator, and (3) provisions requiring the Assessment Office to use the new formula to the fullest extent possible in considering cases which such conference pursuant to § 100.8.

The Department did not feel that these comments warrant incorporation into regulations although it had no objections to the substance of the comments.

The United Mine Workers commented that they be allowed to participate in the informal assessment process at the conference level. The statute sets out that a penalty proceeding is between the government and an operator. Because of this the Department did not feel it could provide a mechanism for official UMW participation, however, in making its assessment the Assessment Office will consider all relevant data available to it. If information is submitted by a miner or representative of miners pertaining to a particular violation that information will be considered in making the assessment.

General comments were received to the effect that the penalties listed in the penalty conversion table were too high. As noted earlier the United Mine Workers feel the opposite. In attempting to achieve the remedial goals of the statute the Department seeks to assess a meaningful penalty. In fact many penalties assessed under the new formula will be different from those assessed under the old formula. This is so because of the sliding scale proposed by the use of the addition of points rather than the multiplication of factors as was previously the case.

[39 F.R. 27559]

The National Independent Coal Operators Association did not offer substantive comments on the regulations but rather criticized them as being illegal. As a precedent they cited the decision of the U.S. Court of Appeals for the Third Circuit in "Rogers C. B. Morton, et al. v. Delta Mining, Inc., GM&W Coal Corporation and Edward Mears, et al.," Nos. 73-1752, 1753 and 1848. The NICOA argues that any assessment procedures which does not require the submission of a penalty case to an administrative law judge for findings of fact in accordance with the Administrative Procedure Act is illegal.

The Third Circuit decision is in conflict with the District of Columbia Circuit decision mentioned above. However, in the Department's view the new procedures set forth below are in accord with both the District Court, and the Third Circuit decision. The Third Circuit distinguished the District of

Columbia Circuit's decision on the basis that the operator had filed a protest. Under these rules where an operator requests a conference (the equivalent of the old protest), all unresolved violations are forwarded to the Office of the Solicitor for filing with the Office of Hearings and Appeals to permit an opportunity for hearing and findings of fact by an administrative law judge.

Much effort has gone into preparation of these new procedures and the Department considers them to be a substantial improvement. The Department believes that this system permits a fair evaluation of the violation at an informal level. The new procedures will be reviewed periodically and additional improvements will be implemented.

The new rules will become effective August 1, 1974.

KENT FRIZZELL,
Acting Secretary of the Interior.

JULY 24, 1974.

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Determination of penalty.
100.4 Procedures for assessment of civil penalties.
100.5 Payment of assessed civil penalty.
100.6 Request for conference.
100.7 Request for hearing.
100.8 Civil penalty cases pending before the Office of Hearings and Appeals as of August 1, 1974.

AUTHORITY: Secs. 109, 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742, P.L. 91-173, 30 U.S.C. 801).

§ 100.1 Purpose.

The assessment of civil penalties under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties: general.

(a) Each Notice of Violation and Order of Withdrawal issued on or after August 1, 1974, shall be reviewed by the Office of Assessments, Mining Enforcement and Safety Administration, in accordance with the assessment procedures described in this part to determine liability of the operator or miner and the amount of penalty to be assessed.

(b) Each pending Notice of Violation and Order of Withdrawal issued prior to August 1, 1974, and not filed with the Office of Hearings and Appeals shall be reviewed by the Office of Assessments, Mining Enforcement and Safety Administration, in accordance with the civil penalty assessment procedures described in the Office of Assessments Manual, May 1973 and in 38 FR 10086, April 24, 1973 to determine liability of the operator or miner and the amount of penalty to be assessed.

(c) Each order of assessment against an operator shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

§ 100.3 Determination of penalty.

(a) The amount of the penalty assessed against an operator will be determined by a formula that takes into account the six criteria stated in § 100.2 (c). The formula will consist of assigning penalty points against the violation being assessed. Penalty points will be determined for each of the criteria stated in § 100.2(c) and totaled. These penalty points will be converted into a dollar amount by using the penalty conversion table in paragraph (g) of this section. The penalty points will be assigned within each of the six criteria according to the schedules in paragraphs (b) through (f) of this section.

(b) The appropriateness of the penalty to the size of the operator's business: The appropriateness of the penalty to the size of the operator's business is calculated on both the size of the mine cited and the size of the company. The size of the mine is taken into account by selecting the proper penalty points from the table listed in subparagraph (1) of this

paragraph. The size of the company is to be considered by using the schedule in subparagraph (2) of this paragraph.

(1) *Size of mine.*

Annual tonnage of mine	*Penalty points*
Under 50,000	0
Over 50,000 to 100,000	1
Over 100,000 to 200,000	2
Over 200,000 to 300,000	3
Over 300,000 to 500,000	4
Over 500,000 to 700,000	5
Over 700,000 to 900,000	6
Over 900,000 to 1.1 million	7
Over 1.1 million to 1.5 million	8
Over 1.5 million to 3 million	9
Over 3 million	10

(2) *Size of company.* The annual tonnage of the company to which the mine belongs will be considered in determining the appropriateness of the penalty to the size of the business of the operator, using the following schedule:

Annual tonnage of company	*Penalty points*
Under 100,000	0
Over 100,000 to 700,000	1
Over 700,000 to 1.5 million	2
Over 1.5 million to 5 million	3
Over 5 million to 10 million	4
Over 10 million	5

As used in subparagraphs (1) and (2) of this paragraph the term "annual tonnage" means the tonnage produced in the previous calendar year or in the case of a mine opened less than one calendar year

the amount of tonnage produced converted to an annual basis.

(c) History of previous violations: The history of previous violations of the Act will account for a maximum of 20 penalty points towards the total amount of penalty points assessed. The penalty points for history of previous violations will be derived from the following schedules:

(1) Average number of violations assessed per year in the preceding 24 months:

Number of violations	*Penalty points*
1 to 10	0
11 to 20	1
21 to 30	2
31 to 40	3
41 to 50	4
Over 50	5

(2) Average number of violations assessed per inspection day in the preceding 24 months:

Violations per inspection day	*Penalty points*
Over 0.3	0
Over 0.3 to 0.4	1
Over 0.4 to 0.5	2
Over 0.5 to 0.6	3
Over 0.6 to 0.7	4
Over 0.7 to 0.8	5
Over 0.8 to 0.9	6
Over 0.9 to 1.0	7
Over 1.0 to 1.1	8
Over 1.1 to 1.2	9
Over 1.2 to 1.3	10
Over 1.3 to 1.4	11

Over 1.4 to 1.5	12
Over 1.5 to 1.6	13
Over 1.6 to 1.7	14
Over 1.7	15

Previous History means all violations presently assessed that have not been vacated or dismissed at the time of assessment.

(d) Negligence: Negligence generally means committed or omitted conduct which falls below a standard of conduct established by law to protect persons against the risks of harm. The standard of care established under the Act is that the operator of a mine owes a high degree of care to the miners employed by him. A mine operator is required to be on the alert for conditions and hazards in the mine which affect the safety or health of his employees and to take the steps necessary to correct or prevent such conditions or practices. Failure to do so is negligent on the part of the operator. This criterion will contribute a maximum of 25 penalty points to the assessment total, divided between no negligence, ordinary negligence, and gross negligence. A violation which occurs through no [39 F.R. 27560] negligence of the operator will be assigned no penalty points for negligence. A violation which occurs through ordinary negligence of the operator will be assigned from 1 to 12 points depending on the specific facts involved. A violation which occurs through gross negligence of the operator will be assigned 13 through 25 penalty points depending on the specific facts involved. In determining the degree of negligence involved in a

violation and the amount of penalty points to be assessed, the following definitions apply:

(1) "No Negligence" means that the operator could not reasonably have known of the violation or under the circumstances the operator had taken reasonable precautions to prevent the violation.

(2) "Ordinary Negligence" means the operator either failed to exercise reasonable care to prevent the violation or failed to exercise reasonable care to correct a violation he knew or should have known existed.

(3) "Gross Negligence" means an operator either caused the condition or practice which occasioned the violation by exercising reckless disregard of mandatory health and safety standards or he recklessly or deliberately failed to correct an unsafe condition or practice he knew or should have known existed.

(e) Gravity: This criterion will contribute a maximum of 30 penalty points to the assessment total. The points will be applied from the following schedules:

(1) Probability of the occurrence of the event against which a standard is directed may account for a maximum total of 10 penalty points using the listed definitions and schedules.

Probability of occurrence:	*Penalty points*
Improbable	0
Probable	3
Imminent	7
Occurred	10

As used in this paragraph the following terms have the following meanings:

Improbable: Unlikely to happen.

Probable: That which is likely to occur.

Imminent: That which is likely to occur before the violation can be abated.

(2) Gravity of injury if it occurred or were to occur, using the listed definitions and the following schedule, may account for a maximum of 10 penalty points:

Gravity of injury normally expected:	*Penalty points*
Nondisabling	0
Disabling	3
Permanent Disabling	7
Fatal	10

Types of injury or illness expected if the event caused or could cause injury are defined as follows:

Nondisabling: Injury or illness, which would not result in lost time of one full day or more after the day of the injury.

Disabling: The injury or illness would cause the injured person to lose one full day of work or more after the day of the injury.

Permanent Disabling: An injury or illness which results in the total or partial loss or use of any member or function of the body.

Fatal: Any work related injury or illness resulting in death.

(3) Number of personnel affected if event occurred or were to occur.

Number of persons affected:	*Penalty points*
0	0
1	1
2	2
3	4
4 to 5	6
6 to 9	8
More than 9	10

(f) Demonstrated good faith of the operator charged in attempting to achieve rapid compliance: This criteria awards negative points for a manifestly conscientious effort to achieve rapid compliance, and can contribute a maximum of 10 points as indicated in the following schedule and definitions:

Degrees of good faith	*Penalty points*
Rapid	10
Normal	0
Lack of good faith	10

In determining the operator's good faith in attempting to achieve rapid compliance, the following definitions apply:

"Rapid Compliance" means there is demonstrated evidence that the operator has taken extraordinary measure to insure abatement of the violation in the shortest possible time.

"Normal Compliance" means the operator has abated the violation within the time given for abatement either originally or as extended.

"Lack of Good Faith" means the operator has been untimely and has not shown diligence and effort in attempting to abate the violation.

(g) Penalty conversion table: The penalty conversion table shall be used to convert the accumulation of penalty points to the appropriate assessment.

Penalty conversion table

Points	Penalty	Points	Penalty
1	2	33	82
2	4	34	86
3	6	35	90
4	8	36	94
5	10	37	98
6	12	38	102
7	14	39	106
8	16	40	110
9	18	41	115
10	20	42	120
11	22	43	125
12	24	44	130
13	26	45	135
14	28	46	140
15	30	47	145
16	32	48	150
17	34	49	155
18	36	50	160
19	38	51	170
20	40	52	180
21	43	53	190
22	46	54	200
23	49	55	210
24	52	56	220
25	55	57	230
26	58	58	240
27	61	59	250
28	64	60	275
29	67	61	300
30	70	62	325
31	74	63	350
32	78	64	375

Points	Penalty	Points	Penalty
65	400	83	1,750
66	425	84	2,000
67	450	85	2,250
68	475	86	2,500
69	500	87	2,750
70	550	88	3,000
71	600	89	3,500
72	650	90	4,000
73	700	91	4,500
74	750	92	5,000
75	800	93	5,500
76	900	94	6,000
77	1,000	95	6,500
78	1,100	96	7,000
79	1,200	97	7,500
80	1,300	98	8,000
81	1,400	99	9,000
82	1,500	100	10,000

(h) The effect on the operator's ability to continue in business: When information is submitted prior to assessment, it is initially presumed that the operator's ability to continue in business will not be affected by the order of assessment. The operator may also submit information to the Office of Assessments concerning this financial status to show that payment of the order of assessment will affect his ability to continue in business. If the information provided by the operator indicates that the order of assessment will adversely affect his ability to continue in business, the Office of Assessments may reduce the penalty.

(i) Waiver of use of formula to determine civil penalty: The Office of Assessments may elect to

waive in whole or in part the use of the formula contained in § 100.3 in determining the civil penalty for a violation of the Act if it deems that conditions concerning the violation warrant. Such special assessments shall take into account the six criteria in § 100.2(c) and all findings shall be in narrative form. All provisions of this part except the formula provisions of § 100.3 shall apply to such special assessments.

§ 100.4 Procedures for assessment of civil penalties.

(a) Within 15 days of service of a notice or order charging a violation of the Act, an operator or miner charged may submit any information pertaining to the violation involved to the Office of Assessments which has jurisdiction over the area in which the mine is located:

Mines in Coal Mine Health & Safety Districts 1, 2 & 3:

Office of Assessments
Federal Building
Pittsburgh & Peters Sts.
Uniontown, Penna. 15401

Mines in Coal Mine Health & Safety District 4:

Office of Assessments
L & S Building
Room 200
810 Quarrier Street
Charleston, W. Va. 25301

Mines in Coal Mine Health & Safety Districts 5, 6, & 9:

Office of Assessments
2195 Euclid Avenue
P.O. Box 29
Bristol, Va. 24201

Mines in Coal Mine Health & Safety Districts 7 & 8:

[39 F.R. 27561]

Office of Assessments
Jordan Building
1220 So. Broadway
Suite 402
Lexington, Ky. 40504

Any information so submitted will be considered by the Office of Assessments in reviewing the notice or order and determining the fact of violation and the amount of the penalty.

(b) The Office of Assessments shall, by certified mail, serve upon the operator or miner charged a copy of the order of assessment together with a copy of the Office of Assessments worksheets showing the formula computation prepared by the Assessment Officer.

(c) The operator or miner shall have 30 days from receipt of the order of assessment to either (1) pay the penalty, (2) request, in writing, a conference with the Office of Assessments to provide information relating to the violations listed in order of assessment, or (3) request, in writing, a hearing on the violations in question before the Department's Office of Hearings and Appeals pursuant to Subpart

F, Part 4, Title 43, Code of Federal Regulations. If the operator or miner does not exercise his right under this subsection within 30 days of receipt of the order of assessment, the order of assessment will be enforced under section 109(a)(4) of the Act.

§ 100.5 Payment of assessed civil penalty.

(a) Payment by the operator or miner of the assessed penalty will close the case.

(b) Payment of the assessed penalty should be sent to the field assessment office having jurisdiction over the area in which the mine is located or to:

Office of Assessment
Mining Enforcement and Safety Administration
Department of the Interior
Washington, D.C. 20240

Check should be made payable to the Mining Enforcement and Safety Administration and should list the Assessment Office Control Number for the case.

§ 100.6 Request for conference.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a conference. Upon receipt of such request, the Office of Assessments shall arrange for a timely conference convenient to both the operator or miner and the Office of Assessments.

(b) If the operator or miner requests a conference with the Office of Assessments, he may submit any additional material to the official assigned his

case which may be relevant to the fact of the violation or the amount of the penalty. Such information may be submitted prior to the conference and discussed during the conference. To expedite the conference, the official assigned to the case may contact the operator or miner to discuss the case prior to such conference.

(c) The Office of Assessments will consider all relevant information on the violation(s) in question presented by the operator or miner and is authorized to recalculate the assessed penalty on the basis of any new information presented to it. When the facts warrant a finding that no violation of the Act or a mandatory health or safety standard occurred, a penalty will not be assessed.

(d) If the operator or miner appears in person and the issues are resolved, he may, at this time, tender payment of the amount agreed upon and thereby dispose of the case, or he may have 10 days within which to submit payment to the Office of Assessments of the amount agreed upon and thereby dispose of the case. All such agreements must be in writing and signed by both parties. Failure to tender payment of the agreed amount within the 10-day period will result in the agreed amount being entered as the final order of the Secretary, enforceable under section 109(a)(4) of the Act.

(e) If all issues cannot be resolved during the conference, the operator or miner may settle those violations in agreement as provided in § 100.6(d)

and have those deleted from the case. Violations not resolved will be forwarded to the Associate Solicitor —Mine Health and Safety, who shall file a petition to assess a civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

§ 100.7 Request for hearing.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a hearing under section 109(a) of the Act. When an operator or miner requests a hearing, the Office of Assessments shall forward the case to the Associate Solicitor—Mine Health and Safety, who shall file a petition for assessment of civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

(b) The petition shall be served on the operator or miner, who, in accordance with the Department's Hearings and Appeals procedures (43 CFR 4.541), shall then have 30 days within which to file an answer to the petition and be afforded an opportunity for a public hearing.

(c) In accordance with 43 CFR 4.545, the Office of Hearings and Appeals shall thereafter issue an order, based on findings of fact and conclusions of law unless the petition is dismissed by consent of the parties.

(d) In assessing a penalty, the Office of Hearings and Appeals may determine de novo the fact of violation and the amount of the civil penalty, taking into consideration the six criteria specified in section 109(a)(3) of the Act.

§ 100.8 Civil penalty cases pending before the Office of Hearings and Appeals as of August 1, 1974.

(a) In all cases previously filed with the Office of Hearings and Appeals, which have not yet been heard or decided by an Administrative Law Judge, an operator may file with the Office of Hearings and Appeals a request for a conference with the Office of Assessments as provided in § 100.4(b)(2). Such request must be postmarked on or before 30 days after the effective date of this part.

(b) Such request should identify the civil penalty case by name, docket number and assessment control number and be addressed to:

Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

The Office of Hearings and Appeals will promptly notify the Office of Assessments of those cases which have timely requested a conference.

(c) The submission of a timely conference request in those cases described in paragraph (a) of this section will operate to stay further proceedings pending holding of the informal conference, but shall in no instance warrant dismissal of the pending case. Failure to resolve the issue involved in the case by

conference will result in the stay of proceedings being dissolved.

[FR Doc. 74-17293 Filed 7-29-74; 8:45 am]

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1678

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL.

v.

ROGERS C. B. MORTON (SECRETARY OF THE INTERIOR OF THE UNITED STATES) ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided February 11, 1974

Michael Kimmel, Attorney, Department of Justice, with whom, *Irving Jaffe*, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney, *Kathryn H. Baldwin*, Attorney, Department of Justice, and *J. Philip Smith*, Assistant Solicitor, Department of the Interior, were on the brief for appellants. *Arnold T. Aikens* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys, also entered an appearance for appellants.

John L. Kilcullen for appellees.

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: Under the Federal Coal Mine Health and Safety Act of 1969 [1] the Secretary of the Interior is charged with enforcing mandatory health and safety standards in the nation's coal mines. Pursuant to this authority the Secretary may assess civil penalties against operators of coal mines in which health and safety violations occur.[2] The present action challenges the procedures adopted by the Secretary to assess these penalties.

Plaintiffs, an association of coal mine operators and various individual coal mine operators, seek an injunction and declaratory relief on the ground that the civil penalty assessment procedures embodied in 30 C.F.R. Pt. 100 violate the procedural requirements of Section 109(a)(3) of the Act, 30 U.S.C. § 819(a)(3) (1970). The district court granted summary judgment for the plaintiffs and permanently enjoined the Secretary from utilizing or enforcing the challenged procedures.[3] Because we find the Secretary's procedures to be legal under the Act as we interpret it, we reverse.

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[1] 30 U.S.C. §§ 801 *et seq.* (1970) (Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 742) [hereinafter referred to as the Act].

[2] 30 U.S.C. § 819 (1970).

[3] National Independent Coal Operators Ass'n. v. Morton, 357 F. Supp. 509 (D.D.C. 1973).

I

When a coal mine inspector discovers a health or safety violation he delivers a notice of violation to the mine operator.[4] This notice contains "a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard . . . ." [5] For example, a notice of violation submitted to this court by the parties describes the violation as follows:

> [At 12:40 P.M. on December 21, 1971, an] accumulation of float coal dust was present in the No. 3 return entry 3 south off 1 Main West for a distance of about 1,500 feet.[6]

Over 227,000 notices of violation were issued from the effective date of the Act, March 30, 1970, through June 30, 1973.[7]

The Act requires that for each violation of a mandatory health or safety standard the mine operator "shall be assessed a civil penalty by the Sec-

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[4] 30 U.S.C. § 814 (1970). The notice of violation requires the mine operator to correct the violation within a specified period. *Id.* § 814(b). In addition to issuing a notice of violation, if the inspector finds that an imminent danger exists, he may direct that all personnel be withdrawn from the area until the danger is abated. *Id.* § 814(a).

[5] *Id.* § 814(e).

[6] Jt. App. at 85.

[7] Brief for Appellant at 18 & n.22. There were in excess of 100,000 notices of violations per year.

retary . . . ." [8] In view of the immense number of violations, the Secretary promulgated rules and regulations establishing preliminary procedures to be followed in assessing civil penalties.[9] It is these preliminary procedures which are challenged in the present action.

The regulations provide that after a notice of violation is issued it is reviewed by an Assessment Officer who determines "the liability of the operator . . . for a civil penalty and the amount of penalty to be proposed." [10] The Act prescribes six factors which the Secretary must consider in determining the amount of the penalty,[11] and the Secretary's regula-

[8] 30 U.S.C. § 819(a)(1) (1970). The net amount assessed under the Part 100 procedures from January 16, 1971 to March 9, 1973 exceeded $24,500,000. Brief for Appellant at 18 n.23.

[9] 30 C.F.R. Pt. 100 (1973). These procedures were adopted in January 1971, 36 FED. REG. 779-80, and were amended in certain respects in June 1972, 37 FED. REG. 11459-60, 11861-62. Since the entry of the district court's order enjoining the preliminary procedures, such procedures have been suspended, 38 FED. REG. 10085 (April 24, 1973), and all penalty assessment cases are being processed under the formal hearing procedures of 43 C.F.R. §§ 4.540 *et seq.*, as revised, 38 FED. REG. 10086-87 (April 24, 1973).

[10] 30 C.F.R. § 100.3(a) (1973).

[11] In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 819(a)(1) (1970).

tions specifically require the assessment officer to consider all relevant circumstances, including the six factors specified in the Act.[12]

After reviewing the notice of violation and determining an appropriate amount for a civil penalty, the assessment officer serves a Proposed Order of Assessment upon the mine operator. This proposed assessment order refers to the particular violation, specifies the amount of the proposed penalty,[13] and advises the mine operator that he has 20 days from receipt of the order either to protest the proposed penalty or to petition for hearing and formal adjudication.[14] If the operator fails timely to protest or request a formal hearing, "he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing,

[12] 30 C.F.R. § 100.3(c) (1973). *See also id.* § 100.2(a).

Subsequent to the district court's injunction, the Secretary amended the assessment procedures to utilize an "assessment formula." 38 FED. REG. 10086 (April 24, 1973). This formula calculates the appropriate penalty in a particular case by assigning numerical values to each of the six statutory factors. *See* Brief for Appellant at 13-17. Although the Secretary has represented to this court that the assessment formula will be retained even if the district court's judgment is reversed, we need not consider the assessment formula in deciding the present case. *Id.* at 12, 13.

[13] 30 C.F.R. § 100.3(b)(2) (1973).

[14] *Id.* § 100.3(d). The operator may protest the order either partly or in its entirety.

and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior." [15]

In the event that the operator protests the proposed order, the assessment officer may reconsider in light of the operator's arguments and redetermine, amend or reissue the proposed order.[16] Upon amendment or reissuance of the proposed order, the operator again has 20 days to accept or reject it in whole or in part, and to request a hearing and formal adjudication.[17] If the operator does not file a timely request for a hearing and formal adjudication, the amended or reissued proposed assessment order becomes the final assessment order of the Secretary.[18]

In the event that the operator does request a hearing,[19] the hearing is de novo [20] and the Secretary has

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[15] *Id.* § 100.3(e). The assessment officer may extend the time allowed for protest. *Id.* § 100.3(g)(1).

[16] *Id.* § 100.3(g)(2), (3).

[17] *Id.* § 100.3(h).

[18] *Id.*

[19] The petition for hearing and formal adjudication must be in writing and must include a list of the violations in issue. 43 C.F.R. § 4.541(a) (1972). Alternatively, the operator may attach to his petition a copy of the final proposed assessment order which clearly indicates the violations at issue. *Id.* § 4.541(b). Within 30 days of filing his petition, the operator must file a short and plain statement of the factual and legal issue, as well as a brief statement concerning the applicability of the six statutory criteria of 30 U.S.C. § 819(a)(1). *Id.* § 4.544(a).

[20] 30 C.F.R. § 100.5(b) (1973).

the burden of proving by a preponderance of the evidence that the violation occurred and that the penalty is warranted.[21] The hearing examiner must render a decision based solely on the record of the hearing,[22] incorporating findings of fact and conclusions of law.[23] Thus, throughout the preliminary procedures for assessing civil penalties, formal adjudication is available to a mine operator who either contests the occurrence of the violation or protests the amount of the proposed penalty.

II

Plaintiffs contend that these preliminary procedures violate the procedural requirements of Section 109(a)(3) of the Act which provides as follows:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating

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[21] 43 C.F.R. § 4.587 (1972).

[22] *Id.* § 4.24.

[23] *Id.* § 4.593. The hearing examiner's decision is reviewable by the Board of Mine Operations Appeals. 43 C.F.R. §§ 4.1(4), 4.500(a)(2), 4.600 (1972).

If the formal adjudication is adverse to the operator he may obtain de novo judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. § 819(a)(4) (1970). The same judicial review is available where the operator fails to request a hearing and allows the proposed assessment order to become final.

> his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

30 U.S.C. § 819(a)(3) (1970). Plaintiffs argue that this section requires a formal decision incorporating findings of fact in every case regardless of whether a mine operator waives his right to a formal hearing by failing to file an objection to the proposed assessment order. If plaintiffs' interpretation of the Act is correct, then the Secretary's preliminary procedures for assessing civil penalties are illegal because, absent a request for formal adjudication, the final assessment order issues without a decision which complies with the formal requirements of the Administrative Procedure Act.[24]

Section 109(a)(3) is logically capable of two different constructions. Plaintiffs would read the statute, even where no hearing is requested by the operator, as follows: "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his finding of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."

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[24] 5 U.S.C. §§ 554, 557 (1970); *see* notes 25-28 *infra* and accompanying text.

The Secretary maintains that the requirement for a decision must be read in context and that the section as a whole describes the formal adjudicative process which is available to a mine operator upon his request. The Act clearly requires a formal decision whenever disputed issues are contested in a hearing. However, according to the Secretary's interpretation, the requirement for a formal decision of the character and extent for which appellant argues, is linked to the statutory guarantee of an opportunity for a hearing. Under this interpretation a formal decision is not required unless the mine operator takes advantage of that opportunity by requesting a hearing.

In deciding which is the proper interpretation it is helpful to identify the nature of the decision contemplated by the Act. The Act requires more than an "act of deciding."[25] The decision described in Section 109(a)(3) parallels the decision required by the Administrative Procedure Act (hereinafter APA) after a formal hearing has been conducted. The APA specifies that a decision following a hearing must include "(A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and (B) the appropriate rule, order sanction, relief, or denial thereof."[26] A decision under Section 109

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[25] WEBSTER'S NEW INTERNATIONAL DICTIONARY 860 (2d ed. unabr. 1961).

[26] 5 U.S.C. § 557(c) (1970).

(a)(3) must include (1) findings on the material issues of the occurrence of a violation and the amount of the penalty, and (2) an order requiring that the penalty be paid.[27] This similarity to a formal APA decision suggests that when a decision is required under Section 109(a)(3), it must contain "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." [28]

Plaintiffs would interpret the Act to require this kind of formal decision even though the mine operator wilfully chooses not to request a hearing on the proposed penalty. However, once given notice of his right to object, the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed. As the district court pointed out, in the absence of a request for a hearing the Secretary may act on the information available to him and need not adduce evidence for the other side.[29] Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order.

In situations where a statute prescribes a hearing prior to agency action the courts have held that the

[27] 30 U.S.C. § 819(a)(3) (1970).

[28] Automotive Parts & Accessories Ass'n. v. Boyd, 132 U.S. App.D.C. 200, 207, 407 F.2d 330, 337 (1968).

[29] 357 F.Supp. at 513.

agency need not conduct a hearing if no disputed issue exists.[30] "In such situations, the rationale is

[30] FPC v. Texaco, 377 U.S. 33, 39-44 (1964); Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n., 356 U.S. 282, 287 (1958); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Dyestuffs & Chemicals, Inc. v. Flemming, 271 F.2d 281, 286-87 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); *see* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-22 (1973).

In *United States v. Storer Broadcasting Co., supra,* the FCC had denied a license application without a hearing because the application established on its face a violation of a substantive FCC rule. Even though the governing statute required a "full hearing" before denial of an application, the Supreme Court concluded that where an application clearly contravened substantive rules, a hearing was unnecessary unless the application

> set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Id. at 205. Therefore, the statutorily prescribed "full hearing" was only required where the applicant demonstrated the existence of a disputed issue.

A similar situation exists in the present case. A notice of violation issued to a mine operator evidences a violation of the substantive health and safety standards established by Congress, and the proposed penalty assessment order is based upon the notice of violation. The operator is advised that he has the right to request formal adjudication and he is fully advised of the consequences of a failure to request such adjudication. If any mine operator objects to the notice of violation or to the proposed penalty and desires a formal decision, he need only request formal adjudication. As in the *Storer Broadcasting* decision, "the way for review is open." *Id.*

that Congress does not intend administrative agencies to perform meaningless tasks." [31] Similarly, as we interpret Section 109(a)(3), the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing.

If the operator wants to contest the alleged violation or if he believes that his particular circumstances warrant a lesser penalty, he need only request a hearing and briefly describe the issues in dispute. Such a request puts the Secretary to his burden in a hearing of proving both the violation and the appropriateness of the penalty. Following the hearing the Secretary has the statutory responsibility for preparing a "decision incorporating his findings of fact therein." [32]

III

The legislative history of Section 109(a)(3) supports the foregoing interpretation of the statute with

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[31] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

[32] We thus interpret the Act to permit any mine operator who desires a formal decision on the alleged violation or the amount of the proposed penalty to obtain such decision merely by indicating his objection and making a simple request for a hearing. By failing to request a hearing he waives his right to formal adjudication. This procedure is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgment entered against him. FED. R. CIV. P. 55.

respect to the decision requirement. Both the Senate and House bills, in the form in which each bill passed its respective house, required a formal decision only after a hearing had been conducted. The House bill provided:

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such operator an opportunity for a hearing and, *in accordance with the request*, determine by decision whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised.[33]

The Senate bill read as follows:

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title

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[33] H.R. 13950, 91st Cong., 1st Sess. § 109(b) (1969) (115 CONG. REC. 32064) (emphasis added). Most of the Act's legislative history is reprinted in a one-volume committee print. HOUSE COMM. ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY FEDERAL COAL MINE HEALTH AND SAFETY ACT (1970) [hereinafter cited as Legislative History]. H.R. 13950 § 109(b) appears in Legislative History at 932.

> 5 of the United States Code shall apply to any such hearing and decision.[34]

The italicized language demonstrates that under both the Senate and the House bills the requirement for a formal decision was clearly tied to the operator's request for a hearing.

Following passage in both houses, the respective bills were referred to a Conference Committee on the disagreeing votes between the two houses. Although the Conference Committee "adopt[ed] the Senate provision," [35] the Committee deleted the language italicized above. Thus the italicized language did not appear in Section 109(a)(3) of the Conference bill which eventually was enacted. The only explanation for this section appears as follows in the Conference Report:

> Both the Senate bill and the House amendment provided an *opportunity* for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any

[34] S. 2917, 91st Cong., 1st Sess. § 808(a)(3) (1969) (115 CONG. REC. 28256, Legislative History at 546) (emphasis added).

[35] H.R. REP. No. 91-761, 91st Cong., 1st Sess. 71 (1969) (Legislative History at 1033).

> notice or order involving a violation of a standard.[36]

We do not believe that the Conference Committee's deletion of the italicized language from the Senate bill reflected an intent to alter the procedural requirements of the bill. The Committee's concern was that the Act afford an *opportunity* for formal adjudication under 5 U.S.C. § 554 and the Conference Report emphasized that "[b]oth the Senate bill and the House amendment provided an *opportunity* for a hearing . . . ." [37] If, as plaintiffs suggest, the Committee intended to alter the bill's procedural requirements to require a formal decision where the operator did not avail himself of the opportunity for formal adjudication, one would expect the Committee to mention the change in the Conference Report. Their failure to do so, together with their statement that they adopted the Senate provision, indicates that the Committee deleted the italicized language because they considered it surplusage.

The district court expressed concern that the preliminary procedures adopted by the Secretary "would shift the initial burden to the mine operator charged with the violation," and that "Congress chose not to adopt such an approach when it was expressly proposed in the 'administration bills' of the proposed legislation." [38] We do not share the district court's

[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added).

[38] 357 F. Supp. at 512.

concern. Requiring the operator to request a hearing and briefly describe the issues in dispute does not impose a significant burden upon the operator. At the hearing the burden remains with the Secretary to prove his case by a preponderance of the evidence.[39]

Furthermore, the legislative history does not reflect congressional disapproval of the procedures adopted by the Secretary. Although the administration bills did specify a procedure similar to that challenged here, the broad procedural requirements ultimately adopted are not inconsistent with the more detailed provisions of the administration bills.

The administration bills, as well as the bill approved by the House, specified that a mine operator must request a hearing in writing within 30 days after receipt of an assessment order.[40] The corresponding section of the Senate bill afforded the mine operator an opportunity for formal adjudication but did not detail the specific procedures for requesting a hearing.[41] The statement in the Conference Report, set forth above,[42] indicates that the Conference Committee considered the only significant difference between these sections of the bills to be the reference in the Senate bill to the Administrative Procedure Act, and that this slight difference was the reason it adopted the language of the Senate bill. In view of the explanation provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills.

[39] 43 C.F.R. § 4.587 (1972).

[40] The pertinent provision of the bill as approved by the House is set forth above. Note 33 *supra* and accompanying text. The corresponding provisions of the administration bills were virtually identical to the provision in the bill approved by the House. *See* S. 1300, 91st Cong., 1st Sess. § 113(b) (1969); H.R. 7976, 91st Cong., 1st Sess., § 113(b) (1969).

[41] Note 34 *supra* and accompanying text.

[42] Note 36 *supra* and accompanying text.

IV

We conclude that the Act does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including a formal decision. The Act does not require a formal decision where no hearing is requested and no issues are in dispute.

Reversed.

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Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC.; G.M.W. COAL COMPANY, INC.;
AND EDWARD MEARS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 1, 1974—CERTIORARI GRANTED JANUARY 27, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
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Oct. 20	Letter advs case assigned to Judge McCune
Nov. 1	Summons ret served on agent of Delta Mining on 10/19 by regis. mail and on representative of miners at DEltaMining by registered mail on 10/19/72
Nov. 8	Motion for extension of time to answer and proposed order filed.
Nov. 8	Letter to Atty Blackwell re: local rule 1 (local counsel)
Nov. 8	Letter to Atty Blackwell advising case assigned Judge McCune)
Nov. 9	Order ent on motion filed 11/8 directing deft have extension until 11/30 to answer (McCune, J)
Nov. 27	ANSWER filed with certificate of service thereon with request for jury trial
1973	
Jan. 5	Motion to transfer action to Middle Dist of Pa filed by deft with certificate of service attached
Jan. 8	Order ent assigning case to Judge Gourley (McCune, J)
Jan. 9	Answer to motion to transfer filed by U S Atty
Jan. 10	Order ent setting hearing on motion to transfer case for 1/16 at 10 AM (Gourley, J)
Jan. 16	Hearing on motion to transfer held before Gourley, J. (denied)—Memo filed (rep M Schmitt)
Jan. 16	Order ent directing attached certification from Marshal be made part of record (Gourley, J)

1973

Jan. 16	Memorandum order ent denying motion to transfer to Middle Dist of Pa.—Further, case consolidated with 72-890 (Gourley, J).
Jan. 24	Praecipe for appearance for G. M W Coal Co at 72-890 and Delta Mining 72-857 filed by Franklyn E. Conflenti, Esq. (filed this no)
Jan. 24	Letter o Atty Conflenti advising case assigned to Gourley, J (filed this no)
Jan. 24	Order ent modifying order of 1/16 and directing pretrial be conducted on 2/14 at 10 AM. Stip of facts not disputed to be filed by 2/12/73 (Gourley, J)
Jan. 31	Transcript of hearing held 1/16 before Gourley, J. filed (rep M Schmitt) (filed this no)
Feb. 9	Motion to withdraw as atty for defts filed by E. W. Van Horn, Jr. (filed this no) and order ent granting same (Gourley, J)
Feb. 9	Joint stipulation of facts filed this no.
Feb. 13	Defts' notice of and motion for judgment on the pleadings filed.
Feb. 14	Hearing on motion for judgment on pleadings and pretrial conference held before Gourley, J. —Memo filed (rep M Schmitt) (filed this no.) (cases not consolidated)
Feb. 15	Order ent 2/14 denying motion for summary judgmt; Further, order ent previously consolidating case with 72-890 is hereby vacated (Gourley, J)
Feb. 15	Order ent 2/14 assigning case to Judge Sorg and directing reporter transcribe record of pretrial at joint expense of parties and file same with Clerk (Gourley, J)
Feb. 23	Motion to withdraw appearance and proposed order filed by Thomas J. MacBride, Esq.
Feb. 26	Order ent, attached to motion filed 2/23, granting motion of Thos MacBride, Esq. to withdraw as atty for defts (Sorg, J)

1973

Feb. 26	Transcript of pretrial conference of 2/14/73 before Gourley, J filed (rep M Schmitt)
Feb. 28	Hearing on further pretrial held before Sorg, J.—Memo filed (no rep) filed this no. (supple pret stip to be filed by 4/10, trial set for 5/7)
May 25	Order ent, pursuant to memorandum filed at CA 72-890, directingjudgmt be ent in favor of deft andagainst plf (Sorg, J)
May 25	Pursuant to order, ent jdgmt is hereby ent of record (B. Schaffer, Clerk) in favor of deft and against plf
May 25	Notice mailed
Jul. 24	NOTICE OF APPEAL FILED by U S Atty from judgmt of Judge Sorg on 5/25/73
Jul. 24	copy notice to ct of appeals and opposing counsel, letters to counsel & J Sorg
Aug. 20	ORIG RECORD MAILED TO CT OF APPEALS (no exhibits in case)
Aug. 22	Receipt for orig record recd from ct of appeals
Sept. 4	Letter received from U.S. Ct. of Appeals advising appeal was docketed at No. 73-1752.

1974

Apr. 1	Opinion of U.S.Ct. of Appeals rec'd and filed affirming judgment of district court (filed 72-857)
June 13	cc judgmt in lieu of formal mandate affirming judgmt of district court and taxing costs against appellant U S and in favor of appellees in the amt of $211.05
June 13	Judgmt for costs in the amt of $211.05 ent in favor of deft and against plf inasmuch as costs were taxed by ct of appeals (B. Schaffler, Clerk)
June 13	Record recd from ct of appeals and receipt issued for same
June 17	Order from ct of appeals amending opinion filed Mar 20, 1974—1st sentence is amended

1974

and last word in line 10 on page 9 is deleted (filed this no)

1975

Feb. 11 Copy of letter from Supreme court to Circuit Ct dated 2/6/75 and letter to B. Schaffler, from Quinn, Clerk of Circuit court dated 2/10 requesting record in this case

Feb. 11 Pursuant to letter reed from Clerk Quinn, and granting of certiorari on 1/27, original record forwarded to Supreme Court with docket entries

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, *Plaintiff* v. DELTA MINING, INC. *Defendant*	CIVIL ACTION NO. 72-857

COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully submits that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an Act of the United States, namely the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by Section 109(a) of the Act (30 U.S.C. § 819(a) and 28 U.S.C. § 1355.

3. Defendant is, and at all relevant times was a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, operating a coal mine subect to the Act in Somerset County, Pennsylvania, within the jurisdiction of this Court and maintaining its principal office at State Line, Pennsylvania.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $375.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on April 11, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Said assessment order has not been vacated, modified, reversed or withdrawn and therefore is the final order of the Secretary of the Department of the Interior, within

the meaning and purview of Section 109(a)(4) of the Act (30 U.S.C. 819(a)(4)).

6. Despite demand, Defendant has failed and refused to pay said civil penalty as required by law.

WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against the Defendant for $375.00 together with interest and costs.

[Filed October 13, 1972]

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against Delta Mining, Incorporated Delta No. 1 Mine Stonycreek Township, Somerset County, Pennsylvania Bureau of Mines Case No. 2312

IN TESTIMONY WHEREOF, I have hereunto subscribed may name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: Delta Mining, Incorporated
Operator

Case No. 2312

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE ..... PROPOSED ORDER OF ASSESSMENT DATED April 11, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-03248-0

IN THE MATTER OF:

Delta Mining, Incorporated Re: Mine:: Delta No. 1
Case No: 2312

Stonycreek Twp, Somerset County, Pennsylvania

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on the for consideration and consideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that Delta Mining, Incorporated be and the same is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars ($375.00) for the following violation:

Violation No:	Date Issued:	Violation:	Assessment:
1 JWH	01-24-72	75.313	$55.00
2 JWH	01-24-72	75.504	80.00
3 JWH	01-24-72	75.1600	30.00
4 JWH	01-24-72	75.1714	60.00
1 JWH	01-26-72	77.400	90.00
2 JWH	01-26-72	77.204	60.00

Total Assessed Amount $375.00

Dated at Washington, D. C.
and entered as the Proposed
Order of Assessment
April 11, 1972.

/s/ Everett Turner
ASSESSMENT OFFICER

EXHIBIT "A"

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ANSWER

Delta Mining, Inc., Defendant in the above-captioned case, answers the Complaint herein as hereinafter set forth in separate Defenses. In addition, and pursuant to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act or Coal Act), Defendant demands a de novo trial on all relevant issues and requests that all disputed issues of fact be submitted to a jury.

First Defense

1. Defendant denies each and every allegation in the Complaint except as hereinafter specifically admitted.

2. In answer to paragraphs 1 and 2 of the Complaint, Defendant admits that Plaintiff seeks to enforce a purported civil penalty assessment order purportedly issued under the Coal Act, but Defendant denies that jurisdiction of the action is properly conferred upon the Court as alleged in paragraph 2 because such purported order was illegally and improperly issued.

3. Defendant admits paragraph 3 of the Complaint.

4. In answer to paragraph 4 of the Complaint, Defendant admits that Exhibit A, referred to in such paragraph, is attached to the complaint, but Defendant denies all other allegations in said paragraph 4 of the Complaint.

5. Defendant denies all of paragraph 5 of the Complaint, except that Defendant admits the purported assessment order has not been vacated, modified, reversed, or withdrawn.

6. Defendant denies all of paragraph 6, except that Defendant admits it has refused to pay the purported civil penalty.

Second Defense

7. Defendant repeats each allegation set forth hereinabove.

8. Defendant avers that the Court does not have jurisdiction to enforce the purported order of assessment or to require Defendant to submit to an expensive, lengthy

trial on said order, because the purported order mentioned in the Complaint was illegally and improperly assessed in violation of Defendant's rights under the Coal Act.

9. The illegality and impropriety of the said order arises from the fact that the assessment procedure leading to the order was not in conformity with the Coal Act which provides that—

> (a) "In determining the amount of the penalty the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." (Sec. 109(a)(1) of Act); and
>
> (b) "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing. . ."
> (Sec. 109(a)(3) of Act.)

10. Defendant avers that Plaintiff could not possibly have complied with Section 109(a)(1) of the Act because the purported assessments were made in accordance with the following minimum penalty schedule.

"Appendix A

Guidelines for Assessment of Penalties

Type of Violation	Penalty Range
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000-$10,000
B. Other Withdrawal Orders	$1,000-$5,000
C. Serious Violations	$ 100-$1,000
D. Nonserious violations	$ 25-$500
2. Miners:	
Smoking or carrying of smoking materials matches, or lighters	$ 25-$250

Note: Consideration of all relevant circumstances in the case of a particular violation may warrant the

Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above."
(Federal Register, Vol. 36, No. 11-Saturday, January 16, 1971)

Defendant further avers that it submitted a substantial amount of data to show a lower assessment was required by the six statutory standards, but Plaintiff's agents ignored such data stating that the assessment policies prohibited deviation from the penalty schedule. The said penalty schedule is illegal, and a penalty assessed thereunder is illegal, because its structure is such that it contains an inherent prohibition against the logical application of the six statutory standards, all of which is evidenced by Plaintiff's recent abolition and termination of use of such penalty schedule.

11. Defendant further avers that the regulations under which the purported orders were issued prohibited Defendant from having a hearing prior to the assessment of the purported penalty, although the right to such hearing is guaranteed by Section 109(a)(3) of the Coal Act. In fact such regulations forced Defendant to participate in a lengthy, expensive assessment procedure which is not in conformity with the Coal Act, and which is violative of Defendant's constitutional rights to due process.

12. As a further reason why the Court lacks jurisdiction to enforce the purported orders, Defendant avers that the so-called "Certification of Record, Plaintiff's Exhibit A, does not constitute an adequate record within the meaning of the provisions of 109(a)(4) of the Act which require the Plaintiff to certify and file with the Court "the record upon which such order sought to be enforced was issued". The Coal Act expressly provides that the Court shall not have jurisdiction until such record is filed with the Court.

Third Defense

13. Defendant repeats each allegation set forth hereinabove.

14. Defendant avers that the so-called "Certification of Record" is not in compliance with the Coal Act and is violative of Defendant's substantive and procedural due process rights under the Fifth Amendment to the Constitution of the United States in that—

(a) The findings of violations and amounts of penalties therein were made and determined ex parte, on the basis of the unsworn testimony of coal mine inspectors, and without Defendant having opportunity to submit interrogatories to or cross-examine such inspectors:

(b) The findings of violations and amounts of penalties therein were made and determined without any consideration being given to a vast amount of evidence submitted by Defendant to show that in most instances the alleged violations did not occur at all, did not occur because of fault by the Defendant, or did not constitute a significant mining hazard; and

(c) The finding of violations and amounts of penalties therein were made and determined arbitrarily and the Secretary's decisions do not adequately show the evidenciary basis for the findings of violations and penalty amounts or the manner by which such findings and penalty amounts were made and determined as required by the Act.

15. Defendant further alleges that the purported findings of violations and penalty assessment order, signed Everett Turner, Assessment Officer, and included in Exhibit A, are illegal, null, and void, because Section 109 (a)(3) of the Act requires that such findings and orders shall be made by the Secretary of Interior.

Fourth Defense

16. Defendant repeats each allegation set forth hereinabove.

17. Defendant denies each and every alleged violation of or under the Coal Act which constitute the basis of the said purported civil penalty assessment order and, further, Defendant demands strict proof of each and every such alleged violation underlying the purported order.

WHEREFORE, Defendant prays this Court to enter a judgment against Plaintiff dismissing the Complaint and awarding costs to Defendant.

[Filed November 27, 1972]

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, January 5, 1973, a motion to transfer the within action to the Middle District of Pennsylvania having been filed and it having come to the attention of this court for the first time that another and similar action is pending here against a corporation owned by the same people which has the same officers (Rogers C. B. Morton, Secretary of Interior, v. G.M.W. Coal Company, Inc., Civil Action No. 72-890),

AND it appearing that the action at No. 72-890 has been assigned to Judge Wallace S. Gourley who has been presented with a motion this date to transfer that case to the Middle District of Pennsylvania.

AND it appearing that both complaints seek to collect civil penalties under the Federal Coal Mine, Health and Safety Act of 1969 (30 U.S.C. 801 et seq.) and that the main office of Delta Mining Inc. is also the main office of G. M. W. Coal Company, Inc., and that the same people operate both companies and that the same attorneys represent both companies,

AND it appearing that both actions should be transferred or retained as the justice of the matter finally appears,

NOW THEREFORE, the within action is reassigned to Judge Wallace S. Gourley for all purposes.

/s/ Barron P. McCune
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff*, v. G. M. W. COAL COMPANY, INC., *Defendant*.	Civil Action No. 72-890
ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff*, v. DELTA MINING, INC., *Defendant*.	Civil Action No. 72-857

MEMORANDUM ORDER

AND NOW, this 16th day of January, 1973, after full and complete hearing, Motion to Transfer the within proceedings to the United States District Court for the Middle District of Pennsylvania is denied, and all previous orders entered by the court in each of said proceedings relative to the procedure to be followed in preparation for trial are vacated.

IT IS FURTHER ORDERED that the above proceedings are consolidated for trial.

Counsel for the United States shall make available for deposition on or before January 30, 1973, such persons as the defendant might request. The parties are directed to confer and consult, and enter into a written stipulation as to all facts not in dispute and interchange all exhibits on or before February 12, 1972, and the proceedings are fixed for trial on the 14th day of February, 1973, at 10:00 a.m., before this member of the Court, in Courtroom No. 2.

The Court Reporter is directed to transcribe the hearing held this date at the joint expense of the parties and file the same in the office of the Clerk of Court.

/s/ Wallace S. Gourley
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. G. M. W. COAL COMPANY, INC.,	Civil Action No. 72-890
ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. DELTA MINING, INC.,	Civil Action No. 72-857

ORDER

AND NOW, this 24th day of January, 1973, in view of the demand the jury trial contained in the answers of defendants in the above captioned cases which have been consolidated for trial, the Order entered on January 16, 1973, setting the proceedings for trial on February 14, 1973, is hereby modified and changed so that on February 14, 1973, a pretrial of the actions will be conducted on said date at 10 A.M. Counsel shall comply in every other respect with the prior order requiring a stipulation of facts not in dispute to be filed on or before February 12, 1973.

/s/ Wallace S. Gourley
Senior District Judge

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
Plaintiff,
v.
G. M. W. COAL COMPANY, INC.,
Defendant.
Civil Action No. 72-890

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior,
Plaintiff,
v.
DELTA MINING, INC.,
Defendant.
Civil Action No. 72-857

JOINT STIPULATION OF FACTS

1. G. M. & W. Coal Company, Inc., is the owner and operator of G. M. & W. Coal Company, Inc., Grove No. 1 Mine (hereinafter "Grove No. 1 Mine"), an underground bituminous coal mine located in the upper Kittanning coal bed, Jennerstown, Somerset County, Pennsylvania.

2. G. M. & W. Coal Company, Inc., Grove No. 1 Mine, and every miner therein is subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (hereinafter "Act").

3. Delta Mining, Inc. is the owner and operator of Delta Mining, Inc., Delta No. 1 Mine (hereinafter "Delta No. 1 Mine"), an underground bituminous coal mine located in the lower Kittanning coal bed, Stonycreek Township, Somerset County, Pennsylvania.

4. Delta Mining, Inc., Delta No. 1 Mine, and every miner therein is subject to the provisions of the Act.

5. Authorized representatives of the Secretary of the Interior (hereinafter "Inspectors") made inspections of Grove No. 1 Mine pursuant to Section 103(a) of the Act,

30 U.S.C. § 813(a), on May 11, 1971, September 14, 1971, November 17, 1971, November 24, 1971, and December 1, 1971. On the dates of said inspections, the Inspectors issued to and served upon Grove No. 1 Mine Notices of Violation pursuant to Section 104(b) of the Act, 30 U.S.C. § 814(b), and/or Order of Withdrawal pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a), a list of which is attached to and made a part of the Complaint filed herein. Additionally, on June 15, 1971, August 27, 1971, September 7, 1971, and October 26, 1971, Inspectors issued to and served upon said operator Notices of Violation pursuant to Section 104(b) of the Act.

6. An Inspector made inspections of Delta No. 1 Mine pursuant to Section 103(a) of the Act, 30 U.S.C. § 813(a), on January 24, 1972, and January 26, 1972. On the dates of said inspections, the Inspector issued to and served upon Delta No. 1 Mine Notices of Violation pursuant to Section 104(b) of the Act, a list which is attached to and made a part of the Complaint filed herein.

7. Grove No. 1 Mine is located in a seam of coal below the water table. In April, 1972, said mine employed approximately 52 employees underground and produced approximately 1600 tons of coal per day on three production shifts.

8. Delta No. 1 Mine was opened on or about November 26, 1971. In January, 1972, said mine employed approximately twelve underground employees and produced approximately 500 tons of coal per day on two production shifts.

/s/ Alexander L. McNaugher
Assistant U.S. Attorney

/s/ I. Avrum Fingeret
Trial Attorney for Plaintiff

/s/ Frederick R. Blackwell
Attorney for Defendants

/s/ Thomas J. MacBride
Attorney for Defendants

/s/ Franklyn E. Conflenti
Cauley, Birsic & Conflenti
Attorneys for Defendants

Approved this 14th day of February 1973 order to be filed.

Wallace S. Gourley

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. G. M. W. COAL COMPANY, INC.,	Civil Action No. 72-890
ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, v. DELTA MINING, INC.	Civil Action No. 72-857

DEFENDANTS' NOTICE OF AND MOTION FOR JUDGMENT ON THE PLEADINGS

Notice

Please Take Notice that the undersigned will bring the within Motion on for hearing before the U. S. District Court for the Western District of Pennsylvania, U. S. Courthouse and Postoffice Building, Pittsburgh, Pennsylvania, on the 13th day of February, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Motion

Defendants in the above captioned cases move for Judgment on the Pleadings on the grounds that the procedures and methods by which the herein penalties were assessed render such penalties illegal, null, and void, and hence, their enforcement by this Court would be violative of Defendants' rights of substantive and procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States. The Motion is based upon the pleadings, and the pertinent Regulations of the Department of the Interior which are contained in the Appendix annexed hereto and which are properly before this Court as a matter of Judicial Notice of the Official acts of a United States Administrative Agency.

The specific grounds of the Motion are that Plaintiff and his agents have violated Defendant's constitutionally protected substantive and procedural due process rights in that Plaintiff has—

1) Deprived Defendants of the pre-assessment hearing guaranteed by § 109(a)(3) of the Act;

2) Deprived Defendants of the right guaranteed by § 109(a)(3) of the Act to have a pre-assessment determination of the Plaintiff "by decision incorporating his findings of fact therein, that a violation did occur, and the amount of penalty which is warranted";

3) Forced Defendants to participate in an illegal, elaborate, and cumbersome protest procedure which is not authorized by the Act, and which in fact was expressly rejected by the Congress; and

4) Used unpublished procedures to make the herein assessment orders the purported "Final Order of the Secretary", in violation of his own regulations which require him to initiate an adjudicatory proceeding to assess the herein penalties.

Counsel's consultations with the U. S. Attorney have not resolved the matters covered by this Motion.

[Filed February 13, 1973]

Morton v. *Delta Mining, Inc.*

No. 72-857, W.D. Pa.

TRANSCRIPT OF PRETRIAL CONFERENCE

Pretrial Conference commencing at 11:08 a.m. on Wednesday, February 14, 1973, in the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher,
Assistant U.S. Attorney

I. Avrum Fingeret, Esquire
Department of Interior

Robert L. Teagan, Esquire
Department of Justice

On behalf of the Defendant:

Frederick R. Blackwell, Esquire

[2] THE COURT: Good morning, gentlemen.

This is the time that the Court fixed for final pretrial hearing of the consolidated action 72-857 and 72-890.

The Court has been advised by its Administrative Assistant that on February 13, which was yesterday, the defendant filed with the Court a motion for judgment on the pleadings.

You may proceed with your argument.

MR. MCNAUGHER: If the Court please, I would like to move for the admission of Attorney I. Avrum Fingeret of the Department of the Interior and Attorney Robert L. Teagan of the Department of Justice. Mr. Fingeret will be trying this case.

THE COURT: Your motion in each instance will be granted.

MR. MCNAUGHER: Mr. Blackwell has asked me to move for his admission if he has not already been so admitted.

THE COURT: The motion will be granted.

MR. TEAGAN: Your Honor, with regard to the motion that was filed by the respondent yesterday afternoon, counsel

for the government was only made aware of that motion late yesterday.

[3] THE COURT: I want to see if there are any disputed questions of fact. If there are, it is impossible for the Court to grant it. That is why I want to hear the defendant. You will know if there are any disputed questions of fact after his argument.

The defendant may proceed.

MR. BLACKWELL: I beg your pardon, Your Honor, did you wish——

THE COURT: The defendant presented to the Court on February 13—yesterday at 10:05 a.m. the defendants' notice of and motion for judgment on the pleadings; I will now hear your argument.

MR. BLACKWELL: Your Honor, before proceeding——

THE COURT: If there are any disputed questions of fact, I cannot grant your motion. I want to hear your argument. The government will know what you are saying and they will tell me whether there are any disputed questions of fact. If there are, I will deny your motion.

MR. BLACKWELL: In previous consultations with the government attorneys, I understand that they wish to exercise their rights to have five days within which to brief a reply.

[4] THE COURT: They don't need one. I want to know if there are any disputed questions of fact. If there are, I will automatically deny your motion from the bench. I am not going to delay this case any longer. It is going to be tried in the next couple of weeks.

MR. FINGERET: Do you want to present your facts? Then we will respond.

THE COURT: Whoever represents the defendant should be heard. The government doesn't run this Court; I run it.

MR. BLACKWELL: Your Honor, before proceeding with the motion, I would like to address the Court on another question, with the Court's leave. I call attention to the proceeding before this Court, to the transcript of the proceeding before this Court on defendant's motion for a change of venue that was held on January 16, 1973.

With the Court's leave, I would have incorporated by reference pages of that transcript—I would not take the Court's time by reading it—Page 11——

THE COURT: I gave the matter reflected judgment. I denied your motion and I don't intend to change my order. [5] MR. BLACKWELL: I am speaking now not for the motion on transfer but on a new matter that I wish to raise with the Court this morning, after I have laid the foundation.

Page 11, Page 18, Page 19, Page 20, Page 21 and Page 22 of that transcript and I call attention to two particular passages in that transcript which I will read to the Court:

I am quoting the Court, "Get me my docket book; I will fix it for trial right now. We have something to do so let's get it done."

"MR. BLACKWELL: Your Honor, I have in mind a motion for summary judgment after these depositions."

"THE COURT: If the government says that you have violated a law and you say that you haven't, I cannot grant you a motion for summary judgment. I know that you big law firms file all these motions; I did the same thing myself."

Close quote.

On Page 21 of the same transcript, I stated to the Court—we were discussing the legal issues:

"MR. BLACKWELL: Well, my view of it, Your Honor, is if we are right on the assessment [6] procedure being illegal, there should not be a trial. This should be resolved in the motion that I was——"

There is an unfinished sentence.

"THE COURT: I deny such a motion. I am going to hear the whole case as I have told you on the 14th day of February, 1973, at 10:00 a.m."

I submit to the Court that the statements made by the Court that is reflected in that transcript of the proceeding of January 16, 1973, conclusively shows that this Court has prejudged the defendant's motion.

THE COURT: That is an absolute misstatement of the facts.

MR. BLACKWELL: I request the Court to withdraw from hearing this motion.

THE COURT: Denied.

MR. BLACKWELL: I request leave to submit a written motion on the point subsequently.

THE COURT: You may submit a written motion and I will deny it.

MR. BLACKWELL: Your Honor, if I may, at the time

being, request leave to speak on a narrow ground of the motion just in respect as to whether there are any material issues of fact. If the Court decides that there are no material issues of fact, [7] then I would request leave to proceed thereafter to argue the legal issues raised by the motion.

THE COURT: You may proceed.

MR. BLACKWELL: The defendant's motion on the pleadings is based on the fact that the procedures and methods by which the herein penalties were assessed render such penalties illegal, null, and void, and, hence, their enforcement by this Court would be violative of defendants' rights of substantive and procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States. The motion is based upon the pleadings, and the pertinent Regulations of the Department of the Interior which are contained in the Appendix annexed hereto and which are properly before this Court as a matter of Judicial Notice of the Official acts of a United States Administrative Agency.

The specific grounds of the Motion are that plaintiff and his agents have violated defendant's constitutionally protected substantive and procedural due process rights in that plaintiff has:

1) Deprived defendants of the pre-assessment hearing guaranteed by Section 109(a)(3) of the Act;

2) Deprived defendants of the right [8] guaranteed by Section 109(a)(3) of the Act to have a pre-assessment determination of the plaintiff, quote, "by decision incorporating his findings of fact therein, that a violation did occur, and the amount of penalty which is warranted", close quote;

3) Forced defendants to participate in an illegal, elaborate, and cumbersome protest procedure which is not authorized by the Act, and which in fact was expressly rejected by the Congress;

4) Used unpublished procedures to make the herein assessment orders the purported Final Order of the Secretary, in violation of his own regulations which require him to initiate an adjudicatory proceeding to assess the herein penalties."

I call attention to the fact that the Appendix to the motion is made up of the pertinent Regulations which are

referred to in our brief, made up of one letter written by the assessment officer. I submit that in that Appendix, the Regulations we do not raise any issues of disputed facts with the government. On that statement, I would suspend until it is determined whether there are issues of disputed fact.

Thank you very much, Your Honor.

[9] THE COURT: The reason that the court originally said that this case would be fixed for trial on February 14, I was laboring under the assumption that it was a non-jury case. It was called to my attention at the time that the matter was last heard that a jury trial was requested. That was the reason that I changed it from a hearing to a final pretrial,

Is it true that you requested a jury trial?

MR. BLACKWELL: Yes, the defendants requested a jury trial.

THE COURT: It should be explained that that is why the previous record shows that the Court had fixed this for final hearing on this day. I converted it from a final hearing to a pretrial.

Do you men understand that?

MR. FINGERET: Yes, we so understand that.

THE COURT: You understood that also, Mr. Blackwell?

MR. BLACKWELL: Yes.

THE COURT: Your offices are where, Mr. Blackwell?

MR. BLACKWELL: In Washington, D. C., [10] Your Honor.

THE COURT: Who is your local counsel?

MR. BLACKWELL: Cauley, Birsic and Conflenti, Mr. Frank Conflenti.

THE COURT: As I told you before, we notify local counsel and it is up to local counsel to get in touch with you.

MR. BLACKWELL: He got in touch with me.

THE COURT: I will approve the joint stipulation of fact which has been presented to the Court. The government may state for the record what your case is about, the same as you would if you were opening before a jury. Tell me what your case is about.

MR. FINGERET: If it please the Court, it is the government's contention that we have filed a petition to enforce a final order of assessment of civil penalty for violations of the Federal Coalmine Health and Safety Act of 1969 against two defendants in this consolidated action.

It is further the government's position that there are issues to be placed before a jury at the trial of this matter, as has been requested by the [11] defendant's here.

THE COURT: You may use the rostrum there if you wish.

MR. FINGERET: Thank you, sir.

THE COURT: What do you say the facts are?

MR. FINGERET: It is our contention that the fact of violation has already been established in the final order of the Secretary.

THE COURT: Does the Court try it de novo before a jury?

MR. FINGERET: There is a matter of the interpretation of the statute as to what de novo actually means.

THE COURT: De novo is that you present your case before a judge and a jury; they hear the defense; the judge charges the jury and the jury decides, under the Court's direction, whether or not there has or has not been a violation.

MR. FINGERET: The question that we have today that we are presenting to the Court is that de novo goes to the amount of the penalty which has been assessed and not to the fact of violation alone. There are three sections of the Act which must be read together. In terms of the Act, they are Sections [12] 105, 106 and 109. As far as US Code is concerned, it is Section 815, 816 and 819.

THE COURT: Of what?

MR. FINGERET: Of US Code, Title 30.

THE COURT: Let's take one defendant at a time.

What do you claim that Delta Mining, Inc. did wrong in Civil Action 72-857?

MR. FINGERET: We are contending, Your Honor, that this has already been determined, that he violated the statute.

THE COURT: Tell me what you say they did wrong?

MR. FINGERET: G. M. W., which is another one of the defendants——

THE COURT: I asked you, sir, if you would proceed with 72-857; tell me what you say they did wrong, what the defendant did wrong?

MR. FINGERET: What we have claimed in this action, Your Honor, is that the defendant has not paid the penalty which was assessed by the final order of the Secretary of the Interior.

THE COURT: I want to know what you claim the defendant did wrong that brought about the imposition of the penalty.

[13] MR. FINGERET: This is Delta Mining—one violation

of the Act—a methane monitor approved as reliable by the Secretary—meaning the Secretary of the Interior—was not installed on a continuous miner in the main section of Delta No. 1 Mine. This was observed by the Federal Coalmine Inspector on January 24, 1972.

Another violation—also, these are all January 24, 1972—conditions or practices observed by an authorized representative of the Secretary of the Interior——

THE COURT: Who?

MR. FINGERET: In this particular case, it was James W. Hawkins who was the Inspector, duly authorized representative. The hose conduit used to protect the wires leading from the junction box of the left cutting head motor was broken on the continuous miner.

Another violation, telephone service was not provided from the surface to the underground working section.

Another violation, the self-rescue device approved by the Secretary was not made available for each underground workman.

The belt chain drive at the top of the [14] storage line was not guarded to prevent persons from coming in contact with the chain drive. The opening around the belt drive on the motor at the top of the storage bin was not covered to prevent persons from falling in the bin.

Those are the violations we say have occurred.

THE COURT: What did the government do after these violations were determined?

MR. FINGERET: Procedurally, Your Honor, the Inspector issues a notice of violation.

THE COURT: I think you have to prove your case before a judge and a jury. What did you do afterwards?

MR. FINGERET: After the Inspector issued a notice of violation, a copy of this notice of violation was sent to the Bureau of Mines in Washington, to the Assessment Officer. The Assessment Officer, in accordance with regulations promulgated by the Secretary pursuant to the Federal Coalmine Health and Safety Act, reviewed the alleged violation. At this particular time, he determined a violation had occurred and under his jurisdiction at this time, applied certain criteria required by Section 109 of the Act and issued a proposed order of assessment to [15] the operator.

The operator then protested the proposed assessment.

THE COURT: Up to that time, it was based on reports of the Inspector?

MR. FINGERET: That is right.

THE COURT: Proceed.

MR. FINGERET: Now, the operator did protest these proposed orders of assessment in writing. The Assessment Officer reviewed the protest.

THE COURT: Did he have a hearing?

MR. FINGERET: No, this is only a proposed order of assessment at this time, Your Honor.

THE COURT: You mean after the protest was filed?

MR. FINGERET: It was proposed before the protest was filed in accordance with the regulations that is Title 30, Federal Code of Regulations, Part 100——

THE COURT: What happened after the protest was filed?

MR. FINGERET: A second proposed order of assessment was issued by the Assessment Officer.

THE COURT: Based on what facts?

[16] MR. FINGERET: Based upon the protest and information supplied by the operator in his protest.

In other words, he reviewed all the descriptions of the violations, the alleged violations, and issued a proposed order of assessment—if you will bear with me, Your Honor, I am trying to see if he did amend it or reissue it.

The proposed order was affirmed. The Assessment Officer did review the protest and determined that the proposed assessment at this time should not be amended or lowered and they should remain the same.

THE COURT: Then what happened?

MR. FINGERET: This reissued proposed order of assessment was sent to the operator. The operators, at this time, did nothing further in accordance with the Regulations. The affirmed order of assessment did tell him that he had so many days from the receipt of this particular document to request hearing and adjudication pursuant to the Regulations. At which time, he had the opportunity to go through the whole administrative procedure, a public hearing on the record, before a qualified, approved law judge and have the fact of violation and [17] the amount of penalty, civil penalty, determined absolutely de novo.

THE COURT: It was given for a hearing if the defendant wanted it?

MR. FINGERET: That is right. He did have that opportunity.

THE COURT: What happened?

MR. FINGERET: At this particular time, the defendant did not avail himself of that opportunity for public hearing but waived his public hearing in accordance with the Regulations by failing to do anything further.

In accordance with the Regulations, the proposed order of assessment then became the final order of the Secretary. Since this final order was not paid under Section 109(a)(4) of the Act—which is Section 819(a)(4) of the Act, Title 30, USC—the matter was forwarded to the Department of Justice where it was filed in this Court. A petition was filed to enforce the final order of the Secretary.

THE COURT: Mr. Blackwell, you state your defense to the action that your adversary counsel has expressed in Civil Action 72-857.

MR. BLACKWELL: May it please the Court, exactly the contrary that has been stated by [18] the government is required by the Statute.

Section 109(a)(4) of the Statute clearly and in unequivocal terms provides that the penalty enforcement proceeding brought by the Secretary of the Interior shall be tried de novo. Statutory language is clear that de novo——

THE COURT: Well, your adversary says that you were given the right to a de novo hearing but you didn't accept it.

MR. BLACKWELL: That was at the phase of development at which the administrative hearing was involved. The de novo trial in the District Court is an all together different proceeding. The administrative proceeding at the Bureau on penalties and the Courtroom trial are two separate proceedings; they are not related.

THE COURT: Did you or did you not elect to take the opportunity to have the trial that you were afforded?

MR. BLACKWELL: Before the administrative——

THE COURT: You heard your adversary speak for the record; you heard what he said.

MR. BLACKWELL: No, we did not and if [19] I may refer to that in a minute, I would like to address further comments on our right to a de novo trial before this Court and our rights to submit fact issues, all facts in dispute, to the jury. We have exercised that right also.

THE COURT: You are going to be given that right.

MR. BLACKWELL: Well, the hearing rights——

THE COURT: They have to prove their case against you the way he has expressed himself and then you can offer your defense. I want to know what your defense is.

MR. BLACKWELL: Our defense is that in many cases, the violations as alleged did not in fact occur.

THE COURT: What evidence are you going to offer?

MR. BLACKWELL: If I may give you an example of one particular violation, Your Honor, in the Grove case, because I can speak more informatively——

THE COURT: You had better get your thinking straight. Whatever you say at pretrial in this Court is final and binding on you.

MR. BLACKWELL: I understand.

[20] THE COURT: You may not offer anything in trial that is in variance with what you offer at pretrial unless the trial judge gives you that right and privilege to prevent manifest[in]g justice. So, I am giving you the opportunity to state for the record your full and complete defense to the government's claim that you heard government's counsel express for this record.

MR. BLACKWELL: If Your Honor will indulge me a moment, I would like to get a paper.

THE COURT: You can have all the time you want.

I don't see how these cases can be consolidated. They are going to have to be tried separately; each one is different.

One can follow the other but I question the propriety of trying them together. We are bound to have different facts in one as evaluated with the other.

So, the order of consolidation, I think, was entered improperly.

MR. BLACKWELL: Your Honor, I am referring to a Defendant's Statement of Contested Facts which we are ready to file with the Court.

THE COURT: Sir, you have to orally [21] state for this record what your defense is to what the government counsel has just stated.

MR. BLACKWELL: The defendants will show that in many instances the alleged violations of health and safety standards did not occur at all.

THE COURT: What do you say didn't occur? Many doesn't mean anything.

MR. BLACKWELL: Well, in both consolidated actions, they have one, two——

THE COURT: Sir, I am only talking about Civil Action 72-857. I limited the government to that and I am going to limit you to that.

These cases cannot be consolidated and tried at the same time.

MR. BLACKWELL: Our defense there, Your Honor, is that they did not occur because of fault by the defendants. In some cases where they may have occurred, they did not create any significant health or safety hazards.

We submit, in addition, that the order which has been filed with the complaint is not the final order of the Secretary, that it did not come into being in conformity with the Secretary's own Regulations.

Now, the controlling Regulations provide [22] that the proposed order of assessment, which is what counsel for the government described here this morning, results in a, quote, final assessment order of the Secretary in only two instances. The first instance is when a person subject to a proposed assessment order defaults in the protest procedures. The government attorney has brought out that these defendants did protest. There is no default in the protest procedure.

The second instance, when it becomes a final order, is when the amended reissued order of the Assessment Officer is accepted by the persons subject to the order. In this case, defendants did not accept the orders. We contend that they are not final orders and they are not ripe for enforcement before this Court.

The hearing opportunity to which the government attorney referred is not the hearing opportunity which the defendants were guaranteed by the statute. The opportunity that was offered was a post-assessment hearing opportunity.

The Statute clearly provides that there shall be a pre-assessment hearing opportunity. Section 109(a)(3) of the Act, I quote, a civil penalty shall be assessed by the Secretary only after— [23] repeating, only after—the person charged with the violation under this Act has been given an opportunity for a public hearing and the Secretary has determined by decision incorporating his findings of fact therein that a violation did occur.

This provision in the Statute has not been complied with

by the plaintiff, by the Department of the Interior and the statement made this morning by the plaintiff's attorney validates that fact, that they did not comply with it. The admission made by the government's attorney was that a proposed order of assessment, with a specific dollar figure, was first issued. Thereafter, and subsequent to a written protest which was made in a context which a penalty had already been assessed, not until after that protest by the defendant had been filed in writing was the defendant offered an opportunity for a hearing. That offer was made in the Assessment Officer's letter in which he sends out his final order of assessment stating that if you do not accept this within fifteen days of receipt, if you do not request a hearing within fifteen days from the receipt of this offer, then this shall become the final assessment order of the Secretary of the Interior.

We submit that that action manifested [24] by that letter of the Assessment Officer, which is part of this record, is violative of the statute. It usurps completely the defendants due process rights to have a hearing prior to the assessment. It deprives the defendants of substantive due process because it is attempting to take the money of the defendants without the hearing procedures, which have been clearly provided by the Statute, having been abided by. The Bureau, the Department of the Interior, has just turned upside down the statutory provision which clearly says that the civil penalties shall be assessed only after the hearing.

In these cases, they assessed a penalty and then said that you can have a hearing within fifteen days. Otherwise, these become final. In addition to that, the fact of the denial of the prehearing assessment in offering only a post-assessment opportunity, the Interior Department did not follow its own Regulations which prescribe how the Assessment Officer's penalty order shall become the final order of the Secretary in the sense that the final order of the Secretary is then ripe to be brought to this Court to seek its power in enforcing the penalty.

The Bureau's own Regulation in effect during the time that all the penalties in both actions [25] were assessed said that there are two ways that the Assessment Officer's proposed penalty assessment shall become the final assessment order of the Secretary of the Interior:

1. If the defendants default in the protest procedure.

If, after the Assessment Officer sends the proposal to a mine operator, under the Regulations, if that mine operator does not make a response, does not submit a protest within fifteen days, then the Regulations provide that in that case, the order which had been previously submitted to the operator shall become the final assessment order of the Secretary.

Now, when that happens, the Department of the Interior could bring to this Court a final assessment which is potentially ripe for enforcement by this Court. We don't have that case here at all. That is not involved here at all.

The second instance in which a proposed assessment order of the Assessment Officer can become final is:

1. If the operator accepts it—well, that is not number one; let me clarify that.

The only other instance in which an Assessment Officer's order can become final is if the [26] operator accepts it. The controlling regulation clearly provides that the penalty is issued—I would like to read the precise text. These are the controlling regulations under which these penalties were assessed. I am quoting from Part 100, Title 30, Chapter 1, Subchapter O, Code of Federal Regulations effective January 16, 1971. The pertinent provisions are in Section 100.4(e) of that Section is where the default provision is contained. The other provision and the provision that is pertinent here is contained in Paragraph H, and I quote:

"The operator or miner charged shall have 15 working days from the date of receipt of such amended or reissued order to accept . . ." to accept ". . . the amended reissued order. Whereupon, it shall become the final assessment order of the Secretary or to request formal adjudication with opportunity for hearing."

Now, the only way under that paragraph that the assessment orders in this case could have become final would have been in the case of the defendant's acceptance. That did not occur. These defendants expressly rejected—and there is no provision in the Regulation that not asking for a hearing gives the Assessment Officer power to declare [27] his assessment order the final order of the Secretary.

In this case, the Secretary of the Interior did not follow his own regulations. Under this Regulation, in the circumstances of this case, in which the defendants did not accept the proposed orders of the Assessment Officer, the only

way and the proper way and the legal way that the Interior Department could have brought to this Court final assessment orders, which are legal and valid and ripe for enforcement by this Court, would have been for the Interior Department to initiate an adjudicatory proceeding, and to bring them to finality that way. It is not a fulfillment of the Interior Department's obligation under the clear provisions of its own language to tell the defendant that you can request a hearing within fifteen days if you choose. It is not legal and proper and authorized under the Department's own Regulations for the Department of the Interior to rid itself of its burden to take the initiative and say, "I am going to get rid of my problem by telling you to take the initiative". That is exactly what the Assessment Officer's order does when he sends it out. He had no authority. There is no regulatory or statutory authority for the Assessment Officer to declare these penalties the [28] final assessment orders in the way that it has happened in this case. It is pure and simple executive fiat and nothing else. It should not receive any support, aid or comfort from this Court.

The law is well settled by a host of authorities that an administrative agency must follow its own regulations in all instances and even in cases where the administrative agency, in absence of a regulation, could commit Act A. But when they put regulations on the book which imposes conditions on committing Act A, the Supreme Court Decisions time after time, the Circuit Court said that you put the regulations on the book and you have to follow them. I submit that that is one of the very critical issues in this case.

The Interior Department does not only not have a document which conclusively establishes facts of violations, they don't even bring a legally, viable instrument into this Court. They haven't followed their own regulations which tell them how an Interior Department order can be brought to such finality that it is then appropriate to come before this Court for enforcement. That is just one thing; that is just one of the legal deficiencies and illegal aspects of what the Interior Department has [29] brought to this Court and asked it to enforce against these defendants.

THE COURT: I am only talking about one case. Will you please keep your argument to Civil Action 72-857.

I have let you talk for twenty five minutes without interrupting and all I am interested in is Civil Action 72-857.

MR. BLACKWELL: In that case, all that I have said about their being illegal, not being properly brought to finality, the Interior Department's regulations, all that applies to this case.

THE COURT: The record will so reflect.

Now, the government's attorney in describing how these penalties were assessed made the statement that after the notice from the Inspector came to the Assessment Officer, that all of the procedures were followed and the assessment was then made. The Interior Department's own certification of records show——

MR. BLACKWELL: Excuse me, Your Honor. I cannot make that statement about this particular case. Their documents on citing the standards do appear to be in order on the Delta Mining case. So, [30] I cannot make that point.

In the Delta Mining case, as I stated, we were deprived of our statutory rights under Section 109(a)(3) to have an opportunity for a hearing before a penalty was assessed. We were denied the opportunity to have findings before a hearing was assessed and the Department did not follow its own Regulations in making them. We submit that they are not ripe and we have defenses on the facts of violation in addition to those legal issues which will be raised.

Thank you very much, Your Honor.

THE COURT: Is there anything else that government's counsel desires to say?

MR. TEAGAN: May I address a few comments to the Court?

THE COURT: You may have all the time you want, sir. This is a pretrial hearing and the purpose of it is for each of you lawyers to alert the other as to what you are going to establish at the time of trial.

Your name, sir?

MR. TEAGAN: My name is Teagan, sir, Robert Teagan.

Counsel, in his discussion of the [31] proposed order of assessment, has made what we consider to be a fatal misstatement. We talk about two orders. We talk about a proposed order of assessment and the Secretary's order. We have to draw a distinction here; it is a very obvious distinction and a vitally important distinction, Your Honor.

After a notice of violation is issued to a mine operator, that notice is sent to the Bureau of Mines. It goes to the Assessment Officer. He evaluates that and he issues what is called the proposed order of assessment. The proposed order of assessment is not an order of assessment. It is not an assessment. The proposed order of assessment is basically a vehicle by which the Bureau of Mines gets the proceeding under way.

It sends the proposed order to the respondent so that he may look at it, draw his own conclusions and make conclusions and any reasons therefore are known to the Bureau of Mines so that the Bureau of Mines will have all the information available that bear on the six criteria provided in Section 109(a)(1) of the Act.

I must affirm as strongly as I can that this is a proposed order of assessment. It is not an assessment. In the accompanying letter that is [32] sent to the mine operator, he is advised of his opportunity to protest this. If he does protest, presumably, he will provide information to the Assessment Officer for the Bureau of Mines which will reflect extremely importantly on each criteria that he must consider. In other words, it is an invitation to provide information.

If he does protest, and he does not like what the Assessment Officer does with the information, he may then—and he is advised of this—he may then request a formal adjudicatory hearing. At the time that he requests this hearing or at the time that he is given the opportunity to request this hearing, he has not been assessed a penalty. He has merely been told what the Bureau of Mines is thinking of and does he have any comments that he wants to make.

The day limitation on this fifteen days—may I make a comment on that? The Act provides that the mine operator shall be given an opportunity for a public hearing by a letter accompanying the proposed order of assessment. He is told of his opportunity. He is given an address to which he might write to request a hearing.

As my co-counsel said, if he requests [33] this hearing, the government is put to a full burden of proof in a de novo proceeding to prove the fact of violation and to introduce evidence bearing on what the appropriate penalty should be.

THE COURT: Present what evidence?

MR. TEAGAN: It is a full de novo hearing at the administrative level pursuant to 109(a)(3) of the Act whereby the government must introduce evidence to prove the violation and also to bear on what, if any, penalty should be assessed.

The time requirement that is stated in the proposed order or the accompanying letter thereto tells that he must reply within fifteen days, fifteen working days, which gives him three weeks to reply. If he fails to do so, it becomes the final order of the Secretary.

This has to be in there, Your Honor. He has to be given the opportunity and the opportunity must stop someplace. The government must draw the line to get these proceedings going, to expedite them. There are currently 2,000 cases pending in the US Attorney's Office and in the Courts which must be processed. And there are many times that number at the Bureau of Mines level. So, a time limitation must be drawn.

[34] Counsel for the respondent mentioned the two defenses that he wishes to bring out in this proceeding. One of them, that he didn't have fault, his client did not have fault. The second one is that none of these violations constitute a significant health or safety violation. If I may say to this Honorable Court, the Act provides in Section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary. It goes on further to say that in assessing a penalty, the Secretary shall consider fault and the importance or lack of importance of a violation. Therefore, that does not bear in any way whatsoever on the fact of the violation. That, Your Honor, is not a defense. Neither one of them is a defense to the fact of the violation.

One last thing may I bring to the attention of this Court: In the proceedings under Section 815, 816 or 105 and 106 of the Act, the mine operator is given the opportunity to challenge the fact of the violation at the administrative level before the Office of Hearings and Appeals of the Department of the Interior. If he isn't satisfied with the decision at that level, he may bring it to the Court of Appeals and have a full hearing of the [35] issue regarding the fact of violation.

In addition to that, when the government is put to its task of proving the violation, in the event that he requests

a formal hearing, we again must prove the fact of violation.

Under 109(a)(4), the provision which provides a de novo review in this Court, the Act specifically states that there shall be a de novo review on all issues except those that could have been decided under Section 816 of the Act. That is the Court of Appeals provision, the fact that the violation could have been adjudicated there, therefore, it cannot be again adjudicated. There were two opportunities at the administrative level before these proceedings to litigate this and the respondents failed to take advantage of these. He cannot again be given the opportunity to litigate the fact of the violation. If the de novo review was complete and did extend to that, it is submitted that the administrative procedure would be totally lacking in any substance whatsoever. It would be totally useless. It would probably tempt most mine operators to totally avoid the administrative level, come into Court and know well that we would have to prove our entire case here anyhow.

[36] For these reasons, Your Honor, the government submits that the defenses raised by the respondent are inadequate in their defense to this action.

THE COURT: Is there anything else you want to state?

This is still Civil Action 72-857. Please, don't repeat what you have already said.

MR. BLACKWELL: I would like to clarify the record on three comments made by the attorney for the government.

He stated that the defendant had a right to challenge the fact of violation. Under the review proceeding of the Act—105, I believe that is the Section—to take those all the way to the Circuit Court if we were not satisfied with the administrative hearing decision—that is not fact. That is absolutely inaccurate.

Under rulings, the administrative rulings by the Interior Department, once a notice of violation, once a condition covered by notice of violation has been abated—means corrected—the rulings of the administrative hearings of the appeals division have held that there is no right to review of that particular notice of violation, that [37] the matter can only be contested in a penalty proceeding.

Dismiss the defendant's contention of insignificance of the health and safety hazards, he says that this has no bearing. I submit to the Court that the Bureau's regu-

lations at the time of these penalty assessments contained express provisions for non-assessment penalties for a non-serious violation. So, that is very much at issue here.

On the position that the assessment order that was issued in this case were all proper and in conformity with the Statute and that it was not a final order until after there was an opportunity for a hearing is really a distinction without a difference. He spoke about the defendant's opportunity to submit protest. The fact is that the defendants were coerced by the regulations to participate in the protest procedure instead of following the Statute which gave the defendant an opportunity for a hearing as the first step in the sequence leading to the assessment of a penalty, they promulgated regulations that said you had to participate in this protest procedure. If you did not, then you were deemed to waive your right to an adjudicatory hearing. So, that is the way they forced us into the protest [38] proceeding.

And then to say that it is not really a penalty until after the fifteen days has expired is really just a thoroughly unrealistic view of how this whole administrative mechanism works because a dollar figure has come into existence, a penalty has been assessed. Under the procedures, these defendants were entitled to an opportunity for a hearing before the assessment of that penalty.

Thank you, Your Honor.

THE COURT: Have you interchanged all your exhibits?

MR. FINGERET: We have discussed——

THE COURT: I direct you to do it within five days of this date. Interchange all your exhibits and mark them. I don't want you in a situation where in a jury trial you proffer an exhibit to the Clerk of Courts to be marked. Mark them within the next five days, each of you. And each of you are to interchange your exhibits with one another.

I think that each of you has clearly set forth his position but if you want to talk some more, go ahead.

MR. FINGERET: For clarification of [39] the Court in what Mr. Blackwell has just raised, a few points referring to the Administrative Board of Mine Operations Appeal cases, in refuting the government's argument, I believe that a little clarification is essential.

In the first place, he said that if in a notice of violation issued under Section 104(b) of the Act—that is 814 USC

Title 30, there is no review under 105—the violation has been abated. This is true in as far as Mr. Blackwell has gone. But he has not gone far enough in accordance with the Regulations in the Act.

These Board Decisions do say that it is moot if the violations have been abated. Under the Act, under 105, in a notice of violation, the reasonableness of the time in which to abate is in issue. But on a notice of violation, an operator is given a certain length of time in which to abate a violation. The operator has a right to request an expedited hearing as to the reasonableness of time——

THE COURT: You men are going to get a hearing in this Court. I cannot dispose of these things with finality at a pretrial hearing. I am not going to do it.

Haven't you each stated your respective [40] positions for this record?

MR. FINGERET: We have stated our respective positions but Mr. Blackwell has raised legal issues which I do not feel that I, in good conscience, could let stand unrefuted unless we have the opportunity to brief them and to present to the Court——

THE COURT: What do you want to brief? I read this brief when it was presented to me yesterday. I am going to deny his motion and I am going to certify this for jury trial.

I am giving each of you men the opportunity to present what your position is for the time of trial.

MR. FINGERET: We feel that there are certain legal issues——

THE COURT: I am not going to dispose of them at pretrial. You are setting forth what they are. You will have a full blown trial. You will have the right and privilege to introduce all the evidence you want, all the legal arguments you want after your evidence has been presented. I think the procedure you have followed is consistent with law. With due deference to Mr. Blackwell's position, if I am wrong, an Appellate Court can tell [41] me so some day.

MR. FINGERET: The only issue I would like to raise, Your Honor, at this particular time, I cannot give a valid list of my witnesses because——

THE COURT: You have to prove your case de novo in this Court. If you don't do it, it will be dismissed.

MR. FINGERET: Again, we get back to the basic question of what is de novo.

THE COURT: De novo is to prove your whole case from the beginning.

MR. FINGERET: That is the Court's ruling on that?

THE COURT: That is right, sir; that is to each of you.

MR. FINGERET: I won't take any more of the Court's time then.

THE COURT: Just a minute. Each of you, within five days, will give the other the names and addresses of all your witnesses, within five days. It is going to be tried right from scratch, the whole way through.

As to each of you, I think the procedure you have followed is proper and the Court has [42] jurisdiction.

MR. FINGERET: In accordance with your ruling, it will be proving fact of violation from scratch?

THE COURT: That is right, sir. That includes any defense of the violation.

Now, what is your estimate of trial time?

MR. FINGERET: On that basis, Your Honor, I estimate a week and a half to two weeks.

THE COURT: Seven to ten days.

MR. FINGERET: Which case are we talking about; are we on Delta?

THE COURT: I am only talking about one case, Civil Action 72-857.

MR. FINGERET: On Delta, sir, I will need a maximum of two and a half days.

THE COURT: How much time do you want, Mr. Blackwell?

MR. BLACKWELL: I would like to begin the week of February 26.

THE COURT: I am not asking you when you are going to try it. I am asking how much time do you want.

MR. BLACKWELL: Excuse me, I misunder- [43] stood. I would agree with Mr. Fingeret's estimate of time.

THE COURT: He said he wanted two and a half.

MR. BLACKWELL: One day in addition.

THE COURT: Three to four days, estimate of trial time.

MR. FINGERET: That is correct, sir.

THE COURT: What are your settlement possibilities, good, fair or bad?

I don't want an argument; I just want to know what they are.

MR. FINGERET: I think they are very poor.

THE COURT: Is there anything else on Civil Action 72-857?

MR. FINGERET: No, sir.

THE COURT: Now, I direct this record to be transcribed at the joint expense of the parties with the original to be filed for the use of the trial judge. If anybody wants a copy, he can request it from the Reporter. Otherwise, one copy will be written and each of you are to pay half. If either or you want the record, you shall request it.

I assign this for trial during the [44] week of February 26 to the Honorable Herbert P. Sorg, a member of this Court, or as soon thereafter as he is available.

MR. BLACKWELL: Excuse me, Your Honor——

THE COURT: The trial will be before the Honorable Herbert P. Sorg, an associate member of this Court. I am satisfying you because you said that you didn't want me to try it; I will not try it.

You men should be able to proceed when you are notified by the Court.

These cases cannot be tried together; they are too involved and complex to labor a jury with two cases of this nature.

Civil Action 72-857 will be tried first and as soon thereafter as Judge Sorg is available, he will try Civil Action 72-890.

(Thereupon, the pretrial conference at Civil Action 72-857 was concluded.)

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the immediate matter before the Court is a motion for summary judgment filed on behalf of the defendant. The Court has considered the motion, the briefs submitted by counsel, and the oral argument held this date, and said motion is denied.

It is further directed that the Order previously entered by the Court in which the within proceeding and Civil Action No. 72-890 were consolidated is hereby vacated because of the involved legal intricacies of the respective cases.

/s/ Wallace S Gourley
Senior District Judge

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the within proceeding is hereby assigned to the Civil Jury List of the Honorable Herbert P. Sorg to be held for final trial the week of February 26, 1973, or as soon thereafter as the Court is available. Counsel shall exchange the list of witnesses to be called for trial and also mark and interchange all exhibits on or before February 21, 1973.

The Court reporter is directed to transcribe the record of the pretrial held at the joint expense of the parties and the original is to be filed in the office of the Clerk of Courts to be used by any member of this Court.

/s/ Wallace S Gourley
Senior District Judge

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

ORDER

AND NOW, this 25th day of May, 1973, for the reasons set forth in the Memorandum filed this date in the case of *Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior vs. G.M.W. Coal Company, Inc.*, Civil Action No. 72-890,

IT IS ORDERED that judgment be entered in favor of the defendant and against the plaintiff in the above entitled case.

/s/ Herbert P. Sorg D.J.

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

JUDGMENT

This action came on for (hearing) before the Court, Honorable HERBERT P. SORG, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in favor of the defendant and against the plaintiff.

Judgment is hereby entered accordingly.

Dated at Pittsburgh, Pa., this 25th day of May, 1973.

Morton v. *Delta Mining, Inc.*
No. 72-857, W.D. Pa.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Herbert P. Sorg, District Judge, dated May 25, 1973.

Filed: July 24, 1973

MORTON v. *G.M.W. COAL COMPANY, INC.*
No. 72-890, W.D. Pa.

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

Docket Entries

1972	
Oct. 20	Complaint filed
Oct. 20	Summons issued
Nov. 1	Summons returned served on deft by cert mail return receipts dated 10/20/72.
Nov. 8	Motion for extension of time to answer and proposed order filed.
Nov. 13	Order entered granting deft an extension of time until 11/30/72 to file an Answer or other responsive pleading. (Gourley, J.)
Nov. 27	ANSWER filed with certificate of service attached thereon. (Demand for Jury Trial)
Nov. 29	Pretrial Memorandum and order entered. (Gourley, J.)
Nov. 29	Order entered setting procedures. (Gourley, J.)
1973	
Jan. 5	Motion to Transfer Action from U.S. Dist Court for the West. Dist of Pa to the Middle Dist of Pa filed by deft.
Jan. 8	Motion for extension of time on all dates in the pretrial memorandum and order and proposed order filed.
Jan. 8	Order entered granting Motion for Extension of Time of 30 days on all dates in the Pretrial Memorandum, (Gourley, J.)
Jan. 9	Answer to Motion to Transfer Action filed by pltf.
Jan. 10	Order entered setting hearing on Motion to Transfer for 1/16/73 at 10 A.M. (Gourley, J.)

1973

Jan. 16 Hearing held on Motion to Transfer before Gourley, J. and concluded. (Memo filed) (Motion-Denied) (Trial set for 2/14/73) (Case consolidated with CA 72-857 for Trial)

Jan. 16 Order entered directing that certification from U.S. Marshal relative to mileage between Pgh & Somerset and Pgh & Harrisburg be filed as part of the record. (Gourley, J.)

Jan. 16 Order entered denying Motion of Transfer; consolidating case with CA 72-857 for Trial; counsel of U.S. make available for deposition on or before 1/30/73 persons deft shall request; parties are to confer and consult, and enter into a written stipulation on or before 2/12/73 and trial fixed for 2/14/73 at 10 A.M.; Court Reporter directed to transcribe the hearing held this date at the joint expense of the parties. (Gourley, J.)

Jan. 24 Praecipe for appearance for GMW Coal Co filed and for Delta Mining (filed 72-857)

Jan. 24 Letter to Atty Conflenti advising case assigned to Judge Gourley

Jan. 24 Order ent modifying order of 1/16, and directing 2/14 at 10 AM as time for pretrial. Stip of facts not in dispute to be filed by 2/12/73 (Gourley, J.)

Jan. 31 Transcript of hearing held 1/16 before Gourley, J. (rep M Schmitt) (filed 72-857)

Feb. 9 Motion to withdraw as atty for defts filed by E. W. Van Horn, Jr. (filed 72-857 with order ent granting same (Gourley, J.))

Feb. 9 Joint stipulation of facts filed at 72-857

Feb. 13 Deft's notice of and motion for judgment on the pleadings filed. (Filed at 72-857 C.A.)

Feb. 14 Hearing on motion for jdgmt on pleadings and pretrial conf held before Gourley, J. Memo filed

1973

(rep M Schmitt (filed 72-857) (case not consolidated)

Feb. 15 Order entered 2/14/73 assigning case to Hon. Herbert P. Sorg for trial the week of Feb. 26, 1973 or soon thereafter; court reporter is directed to transcribe the record of pretrial at the joint expense of the parties. (Gourley, J.)

Feb. 15 Order entered 2/14/73 denying Motion for Summary Judgment filed by deft; further directed that order entered consolidating case with CA 72-857 is hereby vacated. (Gourley, J.)

Feb. 23 Motion to withdraw appearance and proposed order filed by Thomas J. MacBride, Esq (Filed at 72-857 C.A.)

Feb. 26 Transcript filed re: Pretrial held at Pgh. on 2/14/73 before Gourley, J. (Rep. M. Schmitt) (filed 72-857 CA)

Feb. 26 Order entered granting Motion of Thomas J. MacBride, Esqr to withdraw as counsel for defts. (Sorg, J.) (Filed At CA 72-857)

Feb. 28 Hearing held on Further Pretrial before Sorg, J. and concluded. (Supplemental Pretrial Stipulation to be filed by 4/10/73) (Order to be entered) (Filed at CA 72-857)

Mar. 1 Order entered setting trial for 5/7/73; further order that the time for filing supplemental pretrial stipulation is extended to 4/10/73. (Sorg, J.)

Apr. 3 Motion for extension of time for filing stipulations and proposed order filed.

Apr. 3 Order entered granting Motion for Extension of Time for filing stipulations until 4/17/73. (Sorg, J.)

Apr. 18 Order entered continuing trial of case from May 14, 1973 to May 29, 1973 at 10 a.m. (Sorg, J.)

1973

Apr. 20 Motion for extension of time for filing stipulations and proposed order filed.

Apr. 23 Order entered extending time for filing stipulations to April 25, 1973. (Sorg, J.)

Apr. 30 Supplement to Stipulation of Facts Not in Dispute and Statement of Legal Issues upon Which Pltf and Deft are Not in Agreement filed.

May 7 Defendant's Notice of and Motion for Summary Judgment filed.

May 18 Hearing held on Motion for Summary Judgment before Sorg, J. and taken CAV. (Memo filed) (Rep: F. Jones) (Trial Scheduled for 5/29/73 is Continued until Further Order of Court)

May 25 Memorandum filed and Order entered granting Defendant's Motion for Summary Judgment. (Sorg, J.)

May 25 Pursuant to memorandum filed and Order entered Summary Judgment is hereby entered in favor of the defendant and against the plaintiff.

Bernhard Schaffler, Clerk

May 25 Notices mailed.

July 24 Notice of appeal filed by U.S.A.

July 24 Copy of notice mailed Ct of Appeals; copy to all counsel; letters to all counsel of record and to Judge Sorg.

Aug. 20 Original record mailed Ct of Appeals.

Aug. 22 Receipt for original record received from Ct of Appeals.

Sept. 5 Letter received from Ct of Appeals advising that case was docketed at 73-1753.

1974

Apr. 1 Opinion of U.S. Ct. of Appeals rec'd and filed affirming judgment of District court (filed 72-857)

June 13 Original record received from Ct of Appeals. (Receipt for same mailed)

June 13 CC of Judgment received from Court of Appeals Affirming Judgment of District Court; costs taxed in favor of appellees Edward Mears, et in C.A. 73-857 against the appellant U.S.A. in the sum of $243.60; costs taxed in favor of appellee Delta Mining in C.A. 72-928 against the appellant U.S.A. in the sum of $211.05; and judgment is hereby entered of record in as much costs were taxed by Ct of Appeals. (No costs taxed this case)

June 17 Order received from Ct of Appeals amending order of 3/20/74 as follows: first sentence in first full paragraph is amended and the last word in line 10 on page 9 is deleted. (Adams, J.) (Filed at C.A. 72-857)

1975

Jan. 24 Original Record forwarded to U.S. Supreme Court per telephone request.

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff* v. G. M. W. COAL COMPANY, INC., *Defendant*	Civil Action No. 72-890

COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully shows that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an Act of the United States, namely, the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. Sec. 801, *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by Section 109(a) of the Act (30 U.S.C. Sec. 819(a) and 28 U.S.C. Sec. 1355.

3. Defendant is, and at all relevant times was a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, operating a coal mine subject to the Act in Somerset County, Pennsylvania, within the jurisdiction of this Court and maintaining its principal office at State Line, Pennsylvania.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $50.00, was lawfully assessed against Defendant for violation of the Act. A true copy of the Amended Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on May 31, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Further pursuant to Section 109(a) of the Act, a civil

penalty in the amount of $175.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on December 27, 1971, is attached hereto and made a part hereof Petitioner's Exhibit "B".

6. Further pursuant to Section 109(a) of the Act, a civil penalty in the amount of $5,300.00 was lawfully assessed against the Defendant for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendant for a hearing, became final on January 24, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "C".

7. Said assessment orders have not been vacated, modified, reversed or withdrawn and therefore are the final orders of the Secretary of the Department of the Interior, within the meaning and purview of Section 109(a)(4) of the Act (30 U.S.C. 819(a)(4)).

8. Despite demand, Defendant has failed and refused to pay said civil penalties as required by law.

9. WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against Defendant for $5,525.00 together with interest and costs.

[Filed October 20, 1972]

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-1

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. and W. Coal Company, Incorporated
Operator

Case No. 2110-1

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE Amended PROPOSED ORDER OF ASSESSMENT DATED May 31, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF
G. M. and W. Coal Company, Incorporated
Jennerstown, Somerset County, Pennsylvania
Mine: Grove No. 1
Case No.: 2110-1

AMENDED PROPOSED ORDER OF ASSESSMENT

A Proposed Order of Assessment was issued on October 26, 1971 assessing a civil penalty in the amount of $100.00 for certain violations under the Federal Coal Mine Health and Safety Act of 1969.

Protest having been made and duly considered,

It is now ordered that the assessment be amended as follows:

Violation No.	Date Issued	Violation	Assessment
1GWK	06-15-71	70.230	$50.00

Total Assessed Amount $50.00

/s/ Everett Turner
Assessment Officer

Dated at Washington, D.C.
and entered as the Amended
Proposed Order of Assessment
May 31, 1972

EXHIBIT "A"

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-2

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. and W. Coal Company, Incorporated
Operator

Case No. 2110-2

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED December 27, 1971 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF — Case No. 2110-2
G. M. and W. Coal Company, Inc. — Mine: Grove No. 1

Jennerstown, Somerset County, Pennsylvania

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the gravity of the violation;

it is hereby order that G. M. & W Company, Inc. be and the same is hereby assessed a civil penalty in the amount of One hundred seventy-five dollars ($175.00) for the following violations:

Violation No.	Date Issued	Violation	Assessment
1 H.K.G.	08-27-71	70.100	$ 25.00
1 J.J.T.	09-14-71	75.603	100.00
2 J.J.T.	09-14-71	75.516	50.00

Total Assessed Amount $175.00

/s/ David L. Caldwell
Assessment Officer

Dated at Washington, D.C.
and entered as the Proposed
Order of Assessment
December 27, 1971

EXHIBIT "B"

UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 17, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against G. M. and W. Coal Company, Incorporated Grove No. 1 Mine Jennerstown, Somerset County, Pennsylvania Bureau of Mines Case No. 2110-3

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: G. M. W. Coal Company
Operator

Case No. 2110-3

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED January 24, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

IN THE MATTER OF
G. M. W. Coal Company
Jennerstown, Somerset County, Pennsylvania — Re: Mine: Grove No 1. Case No. 2110-3

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that G. M. W. Coal Company be and the same is hereby assessed a civil penalty in the amount of Five thousand three hundred dollars ($5,300.00) for the following violation:

Violation No:	Date Issued	Violation		Assessment
1 D.W. M.	05-11-71	75.1712		$ 25.00
1 H.K.G.	09-07-71	70.230		25.00
1 H.K.G.	10-26-71	70.230		25.00
1 D.B.A.	11-17-71	75.603		100.00
2 D.B.A.	11-17-71	75.516		100.00
1 R.J.F.	11-24-71	104(a)	75.400 75.403	5,000.00
2 D.B.A.	12-01-71	75.307		25.00

Total Assessed Amount $5,300.00

/s/ Everett Turner
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment
January 24, 1972

EXHIBIT "C"

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ANSWER

G. M. W. Coal Company, Inc. Defendant in the above-captioned case, answers the Complaint herein as hereinafter set forth in separate Defenses. In addition, and pursuant to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act or Coal Act), Defendant demands a de novo trial on all relavant issues and requests that all disputed issues of fact be submitted to a jury.

First Defense

1. Defendant denies each and every allegation in the Complaint except as hereinafter specifically admitted.

2. In answer to paragraphs 1 and 2 of the Complaint, Defendant admits that Plaintiff seeks to enforce purported civil penalty assessment orders purportedly issued under the Coal Act, but Defendant denies that jurisdiction of the action is properly conferred upon the Court as alleged in paragraph 2 because such purported orders were illegally and improperly issued.

3. Defendant admits paragraph 3 of the Complaint.

4. In answer to paragraphs 4, 5, and 6 of the Complaint, Defendant admits that Exhibits A, B, and C, referred to in such paragraphs, are attached to the complaint, but Defendant denies all other allegations in said paragraphs 4, 5, and 6 of the Complaint.

5. Defendant denies all of paragraph 7 of the Complaint, except that Defendant admits the purported assessment orders have not been vacated, modified, reversed, or withdrawn.

6. Defendant denies all of paragraph 8, except that Defendant admits it has refused to pay the purported civil penalties.

Second Defense

7. Defendant repeats each allegation set forth hereinabove.

8. Defendant avers that the Court does not have juris-

diction to enforce the purported orders of assessment, or to require Defendant to submit to an expensive, lengthy, trial on said orders, because all of the purported orders mentioned in the Complaint were illegally and improperly assessed in violation of Defendant's rights under the Coal Act.

9. The illegality and impropriety of the said orders arise from the fact that the assessment procedures leading to the said orders were not in conformity with the Coal Act which provides that—

> (a) "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business, of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." (Section 109(a)(1) of Act); and
> (b) "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing. . . ." (Section 109(a)(3) of Act.)

10. Defendant avers that Plaintiff could not possibly have complied with Section 109(a)(1) of the Act because the purported assessments were made in accordance with the following minimum penalty schedule.

"Appendix A

Guidelines for Assessment of Penalties

Type of Violation	Penalty Range
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000-$10,000
B. Other Withdrawal Orders	$1,000-$5,000
C. Serious violations	$ 100-$1,000
D. Nonserious violations	$ 25-$500
2. Miners:	
Smoking or the carrying of smoking materials matches, or lighters	$ 25-$500

Note: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above."

(Federal Register, Vol. 36, No. 11-Saturday, January 16, 1971)

Defendant further avers that it submitted a substantial amount of data to show a lower assessment was required by the six statutory standards provided by Section 109(a)(1) of the Act, but Plaintiff's agents ignored such data stating that the assessment policies prohibited deviation from the penalty schedule. The said penalty schedule is illegal, and penalties assessed thereunder are illegal, because its structure is such that it contains an inherent prohibition against the logical application of the six statutory standards, all of which is evidenced by the Plaintiff's recent abolition and termination of use of such penalty schedule.

11. Defendant further avers that the regulations under which the purported orders were issued prohibited the Defendant from having a hearing prior to the assessment of the purported penalties, although the right to such hearing is guaranteed by Section 109(a)(3) of the Coal Act. In fact such regulations forced Defendant to participate in a lengthy, expensive assessment procedure which is not in conformity with the Coal Act, and which is violative of Defendant's constitutional rights to due process.

12. As a further reason why the Court lacks jurisdiction to enforce the purported orders, Defendant avers that the so-called "Certification of Record", Plaintiff Exhibits A, B, and C, does not constitute an adequate record within the meaning of the provisions of Section 104(a)(4) of the Act which requires Plaintiff to certify and file with the Court "the record upon which such order sought to be enforced was issued." The Coal Act expressly provides that the Court shall not have jurisdiction until such record is filed with the Court.

Third Defense

13. Defendant repeats each allegation set forth hereinabove.

14. Defendant avers that the so-called "Certification of Record is not in compliance with the Coal Act and is violative of Defendant's substantive and procedural due process rights under the Fifth Amendment to the Constitution of the United States in that—

(a) The findings of violations and amounts of penalties therein were made and determined ex parte, on the basis of the unsworn testimony of coal mine inspectors, and without Defendant having opportunity to submit interrogatories to or cross-examine such inspectors:

(b) The findings of violations and amounts of penalties therein were made and determined without any consideration being given to a vast amount of evidence submitted by Defendant to show that in most instances the alleged violations did not occur at all, did not occur because of fault by the Defendant, or did not constitute a significant health or safety hazard; and

(c) The findings of violations and amounts of penalties therein were made and determined arbitrarily and the Secretary's decisions do not adequately show the evidenciary basis for the findings of violations and penalty amounts or the manner by which such findings and penalty amounts were made and determined as required by the Act.

15. Defendant further alleges that the purported findings of violations and penalty assessment orders, signed Everett Turner, Assessment Officer, and included in Plaintiff's Exhibits A, B, and C, are illegal, null, and void, because Section 109(a)(3) of the Act requires that such findings and orders shall be made by the Secretary of Interior.

Fourth Defense

16. Defendant repeats each allegation set forth hereinabove.

17. Defendant denies each and every alleged violation of or under the Coal Act which constitute the basis of the said purported civil penalty assessment orders and, further, Defendant demands strict proof of each and every such alleged violation underlying the purported orders.

WHEREFORE, Defendant prays this Court to enter a judgment against Plaintiff dismissing the Complaint and awarding costs to Defendant.

[Filed November 27, 1972]

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

TRANSCRIPT OF PRETRIAL CONFERENCE

Pretrial Conference commencing at 11:52 a.m. on Wednesday, February 14, 1973, in the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher,
Assistant U. S. Attorney

I. Avrum Fingeret, Esquire
Department of Interior

Robert L. Teagan, Esquire
Department of Justice

On behalf of the Defendant:

Frederick R. Blackwell, Esquire

Marbin I. Schmitt
Court Reporter

[2] THE COURT: Now, what is the government's case in connection with Civil Action 72-890?

MR. FINGERET: Your Honor, in G.M.W. Coal Company, Grove No. 1 Mine, the government will base its case on certain violations of the ——

THE COURT: I want you to say what the coal company did wrong. Neither of you have to make the same extensive speeches that you made in Civil Action 72-857.

MR. FINGERET: A portable fire extinguisher is not provided in No. 3 entry left section where 100 gallons of oil are stored.

The required number of valid respirable dust samples in Section 002 was not submitted for the current sampling period.

Based upon the results of five samples, the concentration of the respirable dust in the working environment at the

continuous miner operator in Section 002 was 3.3 milligrams per cubic meter of air.

Another violation showing the required number of valid respirable dust samples in Section 003 was not submitted for the currect[*sic*] sampling period.

Additionally, there were three temporary [3] splices in the trailing cable for the belt feeder at the tail of No. 2 main belt.

The belt control cable in Section 002 was not all installed and insulated on the belt feeder for 300 feet.

The pump cables for No. 5 Feeder of Section 002 was not installed on insulators.

The required number of valid respirable dust samples in Section 004 was not submitted for the current sampling period.

The trailing cable in the continuous miner had a temporary splice nine feet from the machine.

Loose coal was in excess of three inches deep for a distance of 80 feet in by site pad in No. 3 Main Entry for a distance of eight feet and No. 5 end butt and No. 1 and 2 Main Entry and also for a distance of 40 feet and No. 3 Main Entry end butt, the rock dust was inadequate in the above described area.

Additionally, the power cable for the sequence switch on the conveyor belt on Section 3088 was not supported on insulators and was in contact with combustible material.

That will be the entire violations that [4] we will enter.

THE COURT: The rest of your argument that you made in Civil Action 72-857 will apply to 72-890.

What is your defense to the alleged violations?

MR. BLACKWELL: It will be the same as I described in the other case, Your Honor.

THE COURT: And you allowed none of the conditions that the government said to take place.

MR. BLACKWELL: There were some that did occur but without fault of the operator, Your Honor.

THE COURT: Is there anything more that either of you want to say about Civil Action 72-890?

MR. FINGERET: Nothing, Your Honor.

THE COURT: I am going to give you until February 21 to interchange your exhibits. Mark your exhibits and send them on or before February 21.

You shall also give each other the list of your witnesses on or before February 21.

What is your estimate of trial time?

[5] MR. FINGERET: In this particular case, Your Honor, a week to a week and a half.

THE COURT: Five to seven days?

MR. FINGERET: Yes, as the defendant will not stipulate as to the chain of possession or the authenticity of certain tests that have been involved in these violations. It is going to take considerable testimony to show such chain possession.

THE COURT: How much time do you want, sir?

MR. BLACKWELL: We will add two and a half to three days to that, Your Honor.

THE COURT: The estimate of trial time is ten days.

Is there anything else?

MR. FINGERET: The government has nothing further, Your Honor.

THE COURT: This case is assigned to the Honorable Herbert P. Sorg starting the week of February 26 or as soon thereafter as the judge is available.

Now, do either of you want a copy of this for yourselves? You can't take it out of the Clerk's office during the trial. It doesn't matter to me,

[6] MR. FINGERET: The government would like a copy.

MR. BLACKWELL: Yes, Your Honor.

THE COURT: Make an original and two copies.

The Court will recess.

(Thereupon, the Court was recessed.)

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the immediate matter before the Court is a motion for summary judgment filed on behalf of the defendant. The Court has considered the motion, the briefs submitted by counsel, and the oral argument held this date, and said motion is denied.

It is further directed that the Order previously entered by the Court in which the within proceeding and Civil Action No. 72-857 were consolidated is hereby vacated because of the involved legal intricacies of the respective cases.

/s/ Wallace S. Gourley
Senior District Judge

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 14th day of February, 1973, the within proceeding is hereby assigned to the Civil Jury List of the Honorable Herbert P. Sorg to be fixed for final trial the week of February 26, 1973, or as soon thereafter as the Court is available. Counsel shall exchange the list of witnesses to be called for trial and also mark and interchange all exhibits on or before February 21, 1973.

The Court reporter is directed to transcribe the record of the pretrial held at the joint expense of the parties and the original is to be filed in the office of the Clerk of Courts to be used by any member of this Court.

/s/ Wallace S. Gourley
Senior District Judge

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

ORDER

AND NOW, this 1st day of March, 1973,

IT IS ORDERED that Monday, May 7, 1973, be and the same is hereby fixed for trial of the above captioned case.

IT IS FURTHER ORDERED, upon agreement of the parties, that the time for filing supplemental pretrial stipulations be and the same is hereby extended to April 10, 1973.

/s/ Herbert P. Sorg D.J.

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

SUPPLEMENT TO STIPULATION OF FACTS NOT IN DISPUTE AND STATEMENT OF LEGAL ISSUES UPON WHICH PLAINTIFF AND DEFENDANT ARE NOT IN AGREEMENT

I. Plaintiff and Defendant, by and through their undersigned attorneys stipulate as follows:

1. The following procedure was followed by the Bureau of Mines in submitting the dust samples (hereinafter "samples") to the Coal Analysis Section, Bureau of Mines, Pittsburgh, Pa.

(a) The plastic bags containing the samples and the identification tag attached thereto, and the record cards were packed in a corrugated cardboard shipping carton. This carton was addressed to Coal Analysis Section, U.S. Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania.

(b) Said carton was shipped by United States Mail, Parcel Post, to the above-mentioned address.

(c) Upon arrival at the United States Post Office, Oakland Substation, Pittsburgh, Pennsylvania, said carton was picked up, together with all other mail addressed to the U.S. Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania, by a Bureau of Mines Truck. The aforesaid carton containing the subject samples, together with all other mail addressed to the Coal Analysis Section, was delivered directly to said Section.

(d) Upon delivery of the mail, including the subject carton containing the samples, to the Coal Analysis Section, the mail was distributed and said carton was given to Mr. Raymond Drogwski. Mr. Drogwski opened the carton, took out the samples and the record cards, matched the description on the record cards with the description on the tags affixed to the bags containing samples, stamped the date of receipt on the card, and assigned Laboratory Numbers to the samples. He then wrote the Laboratory Numbers on both the tags and the record cards. The date of receipt was November 29, 1971.

(e) At this point, the bags were not opened and the tags were still attached thereto.

(f) The samples, tags, and record cards were then delivered to Mr. Thomas Majercik, Physical Science Technician.

II. Plaintiff and Defendant are not in agreement on the following legal issues:

1. Whether Plaintiff's procedure and actions regarding assessment of civil penalties herein were in conformity with Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a)(3).

2. Whether Plaintiff's actions regarding assessment of civil penalties herein were in conformity with his published regulations.

3. Whether the *de novo* provision in Section 109(a)(4) of the aforesaid Act, 30 U.S.C. 819(a)(4), is limited to the issue of amount of penalty, or whether such provision encompasses the fact of violation of a standard as well as the issue of penalty amount.

4. Whether a penalty may be assessed for conditions or practices which have not been the subject of a "Notice of Violation" issued by the coal mine inspector who observed said conditions, but which conditions or practices have been stated in an "Order of Withdrawal" issued by said inspector.

III. Plaintiff intends to call as witnesses some or all of the following:

1. Robert J. Chappell, Federal Coal Mine Inspector, Bureau of Mines Subdistrict Office, Johnstown, Pennsylvania.

2. John Nagy, Technical Advisor, United States Bureau of Mines, Technical Support Group, Pittsburgh, Pennsylvania 15213.

3. William R. Devott, Subdistrict Manager, U.S. Bureau of Mines, Johnstown, Pennsylvania.

4. Thomas Majercik, Physical Science Technician, Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania 15213.

5. Forrest Walker, Chemist in Charge, Coal Analysis Section, Bureau of Mines, 4800 Forbes Avenue, Pittsburgh, Pennsylvania 15213.

IV. Defendant intends to call as witnesses some or all of the following:

1. Freeman Fleegle, roof bolter, 224 Main Street, Boswell, Pennsylvania.

2. Donald Shaffer, continuous mining machine operator, Box 1403, Gray, Pennsylvania.

3. Charles R. Davis, mine foreman, 125 West Garrett Street, Somerset, Pennsylvania.

4. Thomas J. MacBride, attorney, P.O. Box 108, 100 Wynneerest Drive, Wayhesboro, Pennsylvania 17268.

5. Charles D. Davis, map draftsman, 125 West Garrett Street, Somerset, Pennsylvania.

6. James E. Park, vice president, G. M. and W. Coal Company, Inc., Broad Top City, Pennsylvania.

7. C. Kenneth Crotsley, Secretary-Treasurer, G. M. and W. Coal Company, Inc., Broad Top City, Pennsylvania.

8. Fred Drening, Jennerstown, Pennsylvania.

9. Everett Turner, Assessment Officer, U.S. Bureau of Mines, 1725 K Street, N.W., Washington, D.C. 20240.

10. John Noon, Assessor, U.S. Bureau of Mines, Uniontown, Pennsylvania.

Respectfully submitted,

/s/ Alexander L. McNaugher
Assistant U.S. Attorney

/s/ I. Avrum Fingeret
Trial Attorney

/s/ Frederick R. Blackwell

/s/ Franklyn E. Conflenti

[Filed April 30, 1973]

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Please Take Notice that the undersigned will bring the within Motion on for hearing before the U. S. District Court for the Western District of Pennsylvania, U. S. Courthouse and Postoffice Building, Pittsburgh, Pennsylvania, on the 7th day of May, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Motion For Summary Judgment

Defendant in the above-captioned case moves for Summary Judgment on the following grounds.

(1) The penalties herein are based upon *pro forma* conclusionary Orders of Assessment and "Findings of Fact" which do not comply with the language and intent of Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 819(a)(3). In a case involving this identical ground and identical facts, the U. S. District Court for the District of Columbia has ruled that the procedural requirements of the Act "have not been complied with" and has issued its order restraining the Plaintiff from making further penalty assessments under the Coal Act under the present procedures of the Department of Interior. *National Independent Coal Operators Association, et. al., vs. Rogers C. B. Morton, Secretary of the Interior,* Civil Action No. 372-72. (U.S.D.C. March 7, 1973) (See attached March 7, 1973 Memorandum and Order of the D.C. District Court; also the Court's March 15, 1973 Restraining Order which was stayed for 40 days by Orders of the Court, but which became effective on April 25, 1973.)

(2) The penalties herein were assessed without any prior or concurrent "Findings of Fact" that the alleged violations for which penalties were assessed had in fact occurred. No such "Findings of Fact" were made by Plaintiff and/or his agents until long after the dates of the herein orders of penalty assessments and, moreover,

such "Findings of Fact" were not made known to Defendant until the filing of the Complaint herein, all of which constituted failure by the Plaintiff and/or his agents to comply with Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), which provides that:

> "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, *by decision incorporating his findings of facts therein, that a violation did occur,* and the amount of the penalty which is warranted . . ." (Emphasis supplied).

(3) The Plaintiff and/or his agents declared each of the assessment orders herein to be the "Final Order of the Secretary" by a method and procedure which does not have any statutory or regulatory basis and which in fact was in conflict with the Plaintiff's own published assessment procedures. Section 100.4(h), Title 30, Chapter 1, Subchapter 0, CFR, effective January 16, 1971, provides as follows:

> "The Operator or minor charged shall have 15 working days from the date of receipt of such amended or reissued order to *accept* the amended or reissued order, *whereupon* it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." (Emphasis supplied)

If the Assessment Officer's order is not accepted by the operator, the above text provides no authority whereby it can become the final order of the Secretary. This Defendant did not accept the orders. But in transmittal letters signed by Mr. Everett Turner, Plaintiff's Assessment Officer, it was declared that, unless Defendant requested a hearing within fifteen days, the order will become the final order of the Secretary.

This Motion is based upon the pleadings and the certified testimony of Mr. Everett Turner from the trial of the above-cited case of *National Independent Coal Operators Association vs. Rogers C. B. Morton, Secretary of Interior, et. al.,* and upon a Report of the U.S. General Accounting Office and the pertinent Regulations of the Department of the Interior, both of which are properly before this Court

as a matter of Judicial Notice of the Official Acts of a United States Administrative Agency. The testimony of Mr. Turner, the Report, and the Regulations are contained in the Appendix annexed hereto.

[Filed May 7, 1973]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Return Receipt Requested

January 13, 1971
[January 13, 1972]

G. M. and W. Coal Company, Inc.
Greencastle, Pennsylvania 17225
Attention: Dwight L. Grove, President

Re: Mine: Grove No. 1
Case No.: 2110-1
Proposed Order Affirmed (xx)
Amended Order Affirmed ( )

Gentlemen:

Receipt is acknowledged of your letter of protest dated *November 26, 1971* relevant to the Order of Assessment dated *October 26, 1971.* After review of all available information, including your letter of protest, the matter was given careful consideration, and the Order of Assessment is hereby affirmed. Please be advised that the abatement of a violation of the Federal Coal Mine Health and Safety Act of 1969 is not a defense relative to a proposed assessment. You may, within fifteen working days of receipt of this letter, request in writing a formal adjudication with an opportunity for a hearing to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

If we do not receive a request for adjudication within the aforementioned time, the matter will then become final. In replying, please refer to the case number.

Payment of the assessment should be made in the form

of check or money order made payable to the United States Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

/s/ Everett Turner
Assessment Officer

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Return Receipt Requested
G. M. and W. Coal Company, Inc.
Greencastle, Pennsylvania 17225

December 27, 1971

Re: Mine: Grove No. 1
Case No.: 2110-2

Attention: Dwight L. Grove, President

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

Failure to file a protest to the proposed assessment or request formal adjudication within the afore-mentioned time will be considered a waiver of your right to protest including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying please refer to the case number.

Payment of the assessment should be made in the form of check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines

Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

/s/ Everett Turner
Assessment Officer
/s/ David L. Caldwell

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02398-0

CERTIFIED MAIL

Registered Return Receipt Requested
G. M. W. Coal Company
Greencastle, Pennsylvania 17225

January 24, 1972

Re: Mine: Grove No. 1
Case No.: 2110-3

Attention: Dwight Grove, President

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U.S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

Failure to file a protest to the proposed assessment within the aforementioned time will be considered a waiver of your right to protest including your right to formal adjudication and an opportunity for a hearing. The matter will then become final. In replying please refer to the case number.

Payment of the assessment should be made in the form of check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines

Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,
/s/ Everett Turner
Assessment Officer

Enclosure

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

ORDER OF WITHDRAWAL

No. 01RJC
8:15 A.M.
November 24, 1971

Johnstown, Pa.

To the operator of the Grove No. 1 mine, G. M. & W. Coal Company, Inc., Jennerstown, Somerset County, Pa., Box 112, Jennerstown, Pa.

Notice is hereby given that the undersigned authorized representative of the Secretary of the Interior, upon making an inspection of this mine on , 19 , finds the existence of the following described condition or practice which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

Condition or practice:

Loose coal was in excess of 3″ deep for a distance of 80 ft. inby sight [spad] No. 160 in No. 3 Main Entry, for a distance of 80 ft. inby No. 3 Entry of 5 Left butt, in Nos. 1 and 2 Main Entries, and also for a distance of 40 feet in No. 3 entry of 5 Left butt. The Rock dust was inadequate in the above described areas.

In accordance with Sec. 104.(a) of the Federal Coal Mine Health and Safety Act of 1969, (P.L. 91-173) you are hereby ordered to cause all persons, except persons referred to in Sec. 104.(d) of the Act, to be withdrawn from and prohibited from entering the following area until an authorized representative of the Secretary of the Interior has determined that the above-described imminent danger no longer exists:

Area from which persons must be withdrawn and prohibited from entering:

The Sections inby the No. 3 belt tail of the Main heading.

Signed Robert J. Chappell

Note: Review of this Order pursuant to Sec. 105.(a) of the Act may be made upon application to the Board of Mine Operations Appeals.

REPORT TO THE
CONSERVATION AND NATURAL
RESOURCES SUBCOMMITTEE
COMMITTEE ON GOVERNMENT
OPERATIONS
HOUSE OF REPRESENTATIVES

Improvements Needed
In The Assessment And Collection
Of Penalties—Federal Coal Mine
Health And Safety Act Of 1969

Bureau of Mines
Department of the Interior

BY THE COMPTROLLER GENERAL
OF THE UNITED STATES

B-170686 July 5, 1972

• • • • •

[25] *GUIDELINES*

The Bureau has not prepared guidelines for assessors to use in considering the factors for penalty assessment and in deciding how the factors should be weighted in determining the amount of the penalty within the ranges provided in the penalty schedule. Assessors relied on their personal judgment, their mining and inspection experience, and informal policy-setting conferences to define and weight these factors. The chief assessment officer informed us that, when inspectors were temporarily assigned as assessors, they were given an oral presentation concerning the assessment procedures and the consideration to be given to the six factors.

The official penalty schedule, established in January 1971 and used in assessing penalties for violations cited after April 1, 1971, provided for ranges in the dollar amounts of penalties to be assessed, depending on the gravity of the violations. For example, the penalty range for a nonserious violation was from $25 to $500.

A GAO sample of about 400 violations [1] assessed from

[1] The violations were contained in 52 proposed assessment cases from 190 randomly selected cases in which the violations were dated April 1, 1971, and after.

April through December 1971 showed that about 50 percent of the penalties were assessed at the minimum amounts. Mines producing 2,000 tons, or more, of coal a day were cited for 50 of the violations at minimum amounts.

Because of the lack of any written guidelines defining the factors and describing the consideration and weight to be given each and the lack of documentation on the consideration given to each of the factors, we were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in these sample cases.

To assist the assessors in the consideration given to the six factors in determining the amounts of penalties to be assessed, guidelines are needed to define each of the [26] factors and to describe how they are to be considered, as well as the weight to be given each factor. Such guidelines would assist (1) assessors in determining penalty amounts and (2) assessors, assigned to reassess disputed penalties, and supervisory personnel, assigned to review assessments, to understand how penalty amounts were determined.

Because the Bureau had not established guidelines for considering the six factors, the mine operators did not know how the factors should be considered and weighted in determining the amount of a penalty. Considering the significance of the dollar amounts of many penalties assessed and the inherent subjectivity in determining the amounts assessed, it appears reasonable that the mine operator should be advised of the guidelines used in assessing penalties.

In addition to submitting a written protest, a mine operator may request a meeting with an assessment officer to discuss his protest. We noted that a significant portion of an assessor's time was spent in such meetings. The chief assessment officer estimated that about 35 percent of the time of three assessment officers was spent meeting with mine operators. Records of these meetings were not maintained, and we could not identify the cases for which such meetings were held. If mine operators knew how the six factors were considered by the assessor, however, the need for these meetings and the number of protests could be reduced.

An official of the Solicitor's Office informed us early in April 1972 that he believed broad guidelines could be es-

tablished on the basis of experience under the act and that his office was working on a response to a request from the Bureau for assistance in preparing guidelines. On April 21, 1972, the Solicitor's Office forwarded suggested guidelines to the Director, Bureau of Mines, for his consideration. A Bureau official informed us on May 24, 1972, that the suggested guidelines were being studied but that a decision had not been reached on their use.

[27]

INFORMATION IN PROPOSED ASSESSMENT ORDERS

The act requires a finding that a violation did occur and requires consideration of six factors in determining the amount of a penalty.

The Subcommittee requested our opinion on whether the findings of fact must include explanations of the consideration given to the six factors and whether the explanations must therefore be included in the proposed order of assessment sent to the mine operator.

Examination of the act and its legislative history did not disclose anything which might be helpful in answering the Subcommittee's questions. We are of the opinion that, in the absence of some indication of intention to the contrary, there is nothing in the wording of subsection 109(a)(3) which would require a conclusion that explanations of the consideration given the six factors should be included in the findings of fact. The six factors are concerned with the amount of penalties, while the findings of fact are required to support findings of violations.

Accordingly, it is our view that, although the six factors must be considered, a description of how the factors were actually considered in determining a specific penalty does not have to be given in the proposed order of assessment sent to the mine operator. In view of the significance of the dollar amounts assessed and the inherent subjectivity in determining the amounts assessed, it appears reasonable that any guidelines developed for use in assessing penalties should be made available to mine operators.

DOCUMENTATION AND REVIEW OF ASSESSMENT ACTION

Proposed orders of assessment should be reviewed on a test basis by Assessment Office officials to evaluate assessor

performance. However, documentation on how the penalty amount was determined was inadequate. The assessment worksheets, the only documentation of the assessment action, listed only the health and safety standards violated and the dollar amounts of the initial assessment and the reassessment for each penalty. There was no documentation showing how or [28] whether the assessor considered (1) the six factors in arriving at the penalty amount or (2) the mine operator's protest when reassessing the case. In our opinion, such documentation is necessary for assessment officials to understand the reasoning behind an original assessment and to facilitate a management evaluation of an assessor's performance and of the overall assessment function.

In a case consisting of 54 violations, the mine operator, in protesting all violations, said that he considered the penalties too high, but he provided specific information on only four. The assessor reduced penalties for the four violations and also for 33 others, 31 of which were reduced 50 percent or more below the initial assessment amounts. There was no documentation showing the bases for the initial penalties or for the amounts of the reassessments.

CONCLUSIONS

The consideration of each factor could be improved through the issuance of guidelines defining each of the six factors and describing the consideration and weight that should be given each factor in determining the amount of a penalty. Adequate documentation should be required to show the consideration given each factor in assessing a penalty.

These guidelines should be made available to the mine operators so that they would better understand how the penalties were assessed.

RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR

We recommend that the Director, Bureau of Mines, be required to:

—Issue guidelines defining each of the six factors, and describing the consideration and weight that should be given each determining the amount of a penalty.
—Make the guidelines available to mine operators.

• • • • •

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL
plaintiffs

vs.

ROGERS C. B. MORTON, ET AL
defendants

No. 397-72 *Civil Action*

I, JAMES F. DAVEY, Clerk *of THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, do hereby certify the annexed to be a true and correct copies of the original* certain pages of Deposition of Everett Turner, dated October 3, 1972, filed 11-2-72 (pp. 341, 342 & 343) - (pp. 338, 339 & 340) - (pp. 366 & 367); (page 578) - Deposition of Everett Turner, dated October 5, 1972, filed 11-2-72; (pp. 47 & 48) - Deposition of Everett Turner, dated June 22, 1972, filed Jul 17, 1972
as (they) appear ..... of record in the Clerk's Office of said Court in the above-entitled cause.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 2nd day of May, 1973

JAMES F. DAVEY, Clerk
By Mary E. Johnson
5/2/73 Deputy Clerk.

• • • • •

[341] call a buck slip; and we keep a copy of that buck slip for our records; so we know when they come back in here what we asked for primarily.

Q. What does the buck slip state?

A. Different things, depending on what is requested. If it states that it does not appear to be a violation as stated, if further explanation or something is on it to that effect, or if a notice of violation comes in that doesn't have an abatement, we do not make the assessment on that; we

send it back to the district and tell them we must have the final action taken on that before we can make a determination on it.

Those buck slips referred to whatever is necessary pertaining to that violation or group of violations.

Q. Now, if the notice of violation states on its face what appears to be a description of a violation of a safety or health standard, do you pursue that any further, or do you accept that statement as representative of the existence of a violation?

A. We accept that if it states a violation as threatened in the description.

Q. So the only time you would call the inspector or the field office would be where there was some irregularity, as [342] it were, on the face of the notice of violation?

A. Normally speaking, yes. However, there might be some lack of adequate description of a violation or exception as indicated may be in error, and we have not established that a violation occurred of that section.

Q. Now, do you make any findings that a violation did occur prior to the time that you or your staff prepare the penalty assessment or proposed order of assessment?

A. Yes; we do.

Q. In what manner do you make it?

A. We—in what manner is it made or record, or what?

Q. Well, you say you make a finding. Tell us how you make a finding.

A. We make a finding on the basis of the charge made by the authorized, duly authorized representative of the section.

Q. In other words, you must find that that states a violation.

A. Right.

Q. You do not find, though, that a violation did in fact occur; is that correct, other than your determination that what appears on the notice purports to charge the occurrence of a violation.

[343] A. That is right.

Q. Now, that charge or citation or notice of violation or whatever we would call it, that, as Mr. Smith has previously said, is not an established violation until a specific finding is made that there was in fact a violation; is that correct?

A. I am not sure that I follow that question.

Q. Well, let me refer you to your—to the affidavit which you submitted, which you signed and which was submitted to the Court in this case in support of the motion of defendants for summary judgment; and in Paragraph 5 of that affidavit, you state: The Secretary, through the assessment procedure, delegated to the Bureau of Mines assessment officer the authority to initially consider whether in fact there was a violation of the Act.

And it goes on to say, If it is found by the assessment officer that a violation of the Act has occurred an initial proposed order of assessment is issued.

Does this clarify the purpose of my question to you?

A. Well, the purpose of your question; yes. But I am not sure what the question is.

Q. Well, the question was, in what manner do you make

• • • • •

[578] continue in business, what information we have available on that, and the previous history of violations.

We never have two identical ones. We don't compare them that way. We go on each inspection citation. The violations that have been alleged are reviewed for that mine based on the other six criteria. They are not compared.

I think that we have very consistent evaluation in this way. But there are so many variables, we do not have specific weight. We take the history of previous violations, we go through all of them after we first establish that the violation did occur. Then we proceed from there on the basis of that.

Q. Let me interrupt again at that point if I may.

You say you first establish the violation did occur. You establish that by looking at the notice of violation?

A. Yes.

Q. If it states on its face a description of the section of the Act that has been violated, that then is treated as an established violation?

A. For the purpose of making a proposed assessment.

MR. SMITH: Initial proposed assessment.

By MR. KILCULLEN:

Q. You are distinguishing now between an initial

• • • • •

[47] have another one, well, say the case number is 301, the second assessment period will be 301-1. That is another

order of assessment, and so on.

That means that we have made 7,805 proposed orders of assessment.

Q. So within that 7,805 cases, you had 95,655 violations listed?

A. Yes, sir.

Q. And you assessed for those violations——

A. Proposed.

Q. ——$20,134,211?

A. Yes.

MR. KILCULLEN: I think I will offer this as Turner Deposition Exhibit No. 7.

(Interoffice Memorandum was marked Turner Deposition Exhibit No. 7.)

By MR. KILCULLEN:

Q. In making the proposed assessments, do you make any written findings regarding the factual information, the findings of fact regarding the alleged violation, or any findings respecting the various criteria that are specified—written findings I am talking about—such as size of the mine, whether the operator was negligent, past history of [48] violations, the effect of the assessment upon the operator's ability to stay in business, or the operator's good faith in correcting the violations?

A. We do not make any written record as findings.

Q. The regulation, Part 100, requires in determining the amount of the proposed penalty in two places, as you are well aware, Mr. Turner, in Section 100.2 and in Section 100.3(c)—100.2 says: Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

The same criteria are set forth, the same words, in Section 100.3(c) of the regulations.

When you make an assessment, do you have before you in each case, in each and every case, information respecting the operator's history of previous violations?

A. Not in every case do we have it available.
Q. Can you elaborate on that a little bit? What do

• • • • •

[338] We either amend, revise or reissue that proposed Order of Assessment, and we notify the operator of our action.

By Mr. Kilcullen:

Q. Do you sometimes meet with the operator?
A. Yes; we do.
Any time that the operator wants to meet with us, we will meet with him and discuss not only the violations or the alleged violations or the circumstances surrounding the thing, but also our procedures.
Q. Do you make any record or notation or do you place in the assessment file any documentation regarding the meetings or discussions you have with the operator?
A. I don't think so. There might be an occasional one but not as a practice.
Q. As a result of the meeting with the operator, if you amend the—or revise the assessment, proposed assessment order in any manner, do you include in the file, the assessment file, any decision or finding or other documentation explaining the reasons for the amendment or revision?
A. In most instances, we require this to be in writing. We will have a conference and discuss it, but we require them to submit the additional information in writing; and that is placed in the file.
[339] A. The operator to supply the information that will give us orally in a conference, and we suggest to him what to do, how to supply us with that information, what form; so the protest should be in writing.
Q. What I asked, though, is not what the operator submits but what you place in the file as your documentation for your action, whatever it might be.
A. As a result of the conference?
Q. Yes.
A. No. We tell the operator at the time; we do inform him of our decision of what we reach at that time; but we do not record it as such in the file.
However, it does reflect in the—if we amend it—in the proposed assessment.
Q. You say in the amount—

A. Yes.
Q. If the amount is changed.
A. Right.
Q. But there is no explanation or finding that would describe the reasons why the change was made.
A. No. But that is described to him orally. It is explained to him.
[340] Q. If he comes in.
A. Yes.
Q. Now, at the initial stage, where you get the notice of violation or the order of withdrawal first, as it comes to you, do you attempt to determine whether a violation did in fact occur?
A. Well, it doesn't come directly to me; it comes to our office and goes in the inspection file.
When that inspection file is pulled for assessment, the assessment officer does—he first attempts to establish that a violation has occurred; that is his first objective.
Now, we do have several hundred that come through here that we do not consider violations; they have not established them; and we do not make a proposed assessment for those.
However, sometimes we do send them back to the district or telephone the district to find out this additional information.
Q. When you telephone the district to get additional information, do you place any notations in the file regarding that or explaining what additional information was obtained?
A. Sometimes we do; most times we do not. However, we have more recently been referring those back with what we

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[366] Q. Now, then, other than the handwritten notation that might appear in this form, there would be no written decisions or findings explaining the action that was taken in either amending or affirming or vacating.
A. Well, there are lots of notes explaining, and a lot of files. I haven't made a search through them to find out; but I explained the action taken, especially on protests.
Q. Now, is there any information given to the operator apprising him of the reason for this particular action taken?

A. No; no, there isn't—unless it is given to him at a conference, at an informal conference, at this office or one of the other offices.

Q. When you affirm or amend or vate [*sic*] a proposed assessment or, proposed assessment order, no explanation is given to the operator?

A. That is right.

Q. Now, these notations—

MR. SMITH: No written explanation.

THE WITNESS: Yes.

MR. SMITH: Is that your question?

MR. KILCULLEN: That is correct; yes.

By MR. KILCULLEN:

Q. And no written findings of facts are made on this [367] regarding the action taken.

A. You mean as a result of a protest.

Q. That is correct.

When you affirm, amend, or vacate a proposed assessment order, no written findings of fact are made regarding that action.

A. No.

Q. Now, at that stage, Mr. Turner, no written finding has been made that a violation has occurred; is that correct?

A. No; that is not correct. It has been on the proposed order of assessment prior to that action.

Q. No, sir. I am talking about a finding that the violation did in fact occur. Now, there is nothing on the proposed order of assessment. This is the form that you had been using until September of this year; it is Exhibit 23. There is nothing on that that states any written finding of fact; is there?

A. That is correct. The one you are referring to are the ones used prior to September, before it was revised.

Q. Getting back then to the point where you have, after protest by the operator, affirmed, amended, or vacated the order.

No written finding of fact has been made up until

• • • • •

Morton v. *G. M. W. Coal Company, Inc.*
No. 72-890, W.D. Pa.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Herbert P. Sorg, District Judge, dated May 25, 1973.

Filed: July 24, 1973

MORTON* v. *EDWARD MEARS, ET AL.
No. 72-928, W.D. Pa.

Morton v. *Edward Mears, Et Al.*
No. 72-928, W.D. Pa.

DOCKET ENTRIES

1972	
Nov. 1	Complaint Filed
Nov. 1	Summons issued
Nov. 8	Letter advising case assigned to Judge Weis
Nov. 9	#285 Marshal form, exec on 11/3 on Edward Mears, by certif mail dated 11/1
Nov. 9	#285 Marshal form, exec on 11/3 on Earl Bence, by certif mail dated 11/1
Nov. 9	#285 Marshal form, exec on 11/3 on Charles J Mears by certif mail dated 11/1
Nov. 9	#285 Marshal form, exec on Murray Martin by certif mail dated 11/1
Nov. 9	#285 Marshal form, exec on Rocco Yanity by certif mail dated 11/1
Nov. 9	#385 Marshal form, exec on Yanity Brothers Coal a/k/a M. Y. Coal Co on 11/3, by certif mail dated 11/1
Nov. 14	Summons and forms 285 ret served on Casmer Yanity, indiv & t/d/b/a Yanity Bros Coal a/k/a M.Y. Coal on 11/9 and on Tony Yanity, indiv & t/d/b/a Yanity Bros Coal a/k/a M. Y. Coal Co on 11/9/72, by certif mail dated 11/1/72
Nov. 27	ANSWER filed by defts
Nov. 27	Letter to Owens and Jacobs, Esqrs. advising case assigned to Judge Weis
1973	
Jan. 3	Notice of Preliminary Conf. for 1/16/73 at 4:00 filed

1973

Jan. 16	Preliminary conference held before Weis, J.—concluded CAV. Memo filed (no rep)
Feb. 16	Motion for judgment on the pleadings, or, in the alternative, for summary judgment filed by defts.
Feb. 23	Motion to extend time to answer defts motion for judmt on pleadings and/or summary judgment filed by U S and order ent granting plf 30 days from this order to file answer to defts' motions (Weis, J)
May 2	Opposition to motion for judgmt on pleadings, or for summary; judgmt and cross motion for summary judgmt filed by U S with memorandum attached
May 3	Notice setting status conference for 5/11 at 10 AM before Judge Snyder
May 11	Status conference held before Snyder, J.—Memo filed (no rep) (briefs to be filed)
May 23	Motion to amend complaint for enforcement of civil penalty assessment order and proposed order filed by pltf.
May 30	Copy of letter to U S Atty's office dated 5/30, granting until 6/13 to file brief
June 19	Order ent, attached to motion filed 5/23, granting motion to amend complaint and defts given 20 days to file answer (Synder, J)
June 20	Letter to John L Kilcullen from James Drach. Dep Clerk
June 25	Praecipe for appearance for deft filed by Henry Ingram. Esq.
June 25	Defts' supplemental memorandum of points and authorities in support of motion to dismiss filed
June 28	Order ent granting defts' motion for summary judgmt (Snyder, J)
June 28	Pursuant to motion filed and order ent, deft's motion for summary judgmt is granted (B. Schaffler, Clerk)

1973

June 28	Notice mailed
July 10	Motion for leave to withdraw appearance filed by John Owens with proposed order
July 10	ORDER entered granting Motion for leave to withdraw appearance filed by John Owens. (Snyder, J.)
Aug. 24	NOTICE OF APPEAL FILED BY US (from judmnt ent 6/28/73)
Aug. 24	Copy notice of appeal, letter to ct of appeals, letters to counsel, jdge
Sept. 24	ORIGINAL RECORD mailed ct of appeals (no exhibits)
Oct. 5	Notice from ct appeals—case docketed at 73-1848
Oct. 5	Receipt from ct appeals for orig record

1974

Apr. 1	Opinion of U.S. Ct. of Appeals rec'd and filed affirming judgment of District Court (filed 72-857)
June 13	cc judgmt in lieu of formal mandate affirming judgmt of district court and taxing costs in favor of defts and against plf U S in the amt of $243.60
June 13	Judgmt for costs in the amt of $243.60 ent in favor of defts and against plf US inasmuch as costs were taxed by ct of appeal (Bl Schaffler, Clerk) receipt issued for
June 17	Order recd from ct of appeals amending opinion filed March 20, 1974 1st sentence is amended and last word in line 10 on page 9 is deleted (filed 72-857)

1975

Feb. 24	Record forwarded to Supreme Court pursuant to telephone conversation requesting same

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of the Interior, United States Department of the Interior, *Plaintiff* v. EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, Individually and as partners, t/d/b/a YANITY BROTHERS COAL COMPANY, a/k/a M. Y. COAL COMPANY, *Defendants*	Civil Action No. 72-928

COMPLAINT FOR ENFORCEMENT OF CIVIL PENALTY ASSESSMENT ORDER

The Petition of Rogers C. B. Morton, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, respectfully shows that:

1. This Complaint is for the enforcement of a civil penalty assessment order issued under an act of the United States namely, the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801, *et seq.*) (the Act).

2. Jurisdiction of this action is conferred upon the Court by § 109(a) of the Act 930 U.S.C. § 819(a) and 28 U.S.C. § 1355.

3. Defendants are and at all relevant time were Edward Mears, Earl Bence, Charles J. Mears, Rocco Yanity, Murray Martin, Casmer Yanity and Tony Yanity, individuals and partners, trading and doing business as Yanity Brothers Coal Company, also known as M. Y. Coal Company, as set forth in registration under the Fictitious Names Act, filed on May 20, 1966 and registered on or about June 3, 1966 in the Prothonotary's office of Indiana County, in the Western District of Pennsylvania, operating a coal mine subject to

the Act in Indiana County, Pennsylvania, within the jurisdiction of this Court, and maintaining its principal office at 11 East Pike, Indiana, Pennsylvania 15701.

4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $680.00 was lawfully assessed against Defendants for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendants for a hearing, became final on October 26, 1971, is attached hereto and made a part hereof Petitioner's Exhibit "A".

5. Further pursuant to Section 109(a) of the Act, a civil penalty in the amount of $1,320.00 was lawfully assessed against Defendants for violation of the Act. A true copy of the Proposed Order of Assessment, which, in the absence of any protest or request by the Defendants for a hearing became final on April 11, 1972, is attached hereto and made a part hereof Petitioner's Exhibit "B".

6. Said assessment orders have not been vacated, modified, reversed or withdrawn and therefore are the final orders of the Secretary of the Department of the Interior, within the meaning and purview of Section 109(a) of the Act (30 U.S.C. § 819(a)(4)).

7. Despite demand, Defendants have failed and refused to pay said civil penalties as required by law.

WHEREFORE, Plaintiff prays that the Court enter judgment against Defendants for $2,000.00 together with interest and costs.

[Filed November 1, 1972]

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 4, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed documents are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against M. Y. Coal Company M. Y. No. 1 Mine Clymer, Indiana County, Pennsylvania Bureau of Mines Case No. 2307-1

TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

August 4, 1972

Re: M. Y. Coal Company
Operator
Case No. 2307-1

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED October 26, 1971 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02396-0

IN THE MATTER OF
M. Y. Coal Company
Clymer, Indiana County, Pennsylvania

Case No: 2307-1
Mine: M. Y. No. 1

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged;

it is hereby ordered that M. Y. Coal Company be and the same is hereby assessed a civil penalty in the amount of Six hundred eighty dollars ($680.00) for the following violations:

Violation No.	Date Issued	Violation	Assessment
1 R.C.C.	04-14-71	75.701	$ 25.00
1 R.C.C.	04-15-71	75.200	200.00
2 R.C.C.	04-15-71	75.603	50.00
5 R.C.C.	04-15-71	75.1704	25.00
2 L.R.S.	06-29-71	70.100	25.00
1 R.J.C.	09-13-71	75.303	25.00
2 R.J.C.	09-13-71	75.512	30.00
3 R.J.C.	09-13-71	75.1100	100.00
4 R.J.C.	09-13-71	75.507	100.00
5 R.J.C.	09-13-71	75.516	100.00

Total Assessed Amount $680.00

/s/ Everett Turner
Assessment Officer

Dated at Washington, D.C.
and entered as the Proposed
Order of Assessment
October 26, 1971

EXHIBIT "A"

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

August 4, 1972

CERTIFICATION OF RECORD

Pursuant to Title 30, Section 819(a)(4), Title 43, Section 1460, and Title 28, Section 1733, United States Code, and by virtue of the authority delegated to me by the Secretary of the Interior, I hereby certify that the annexed document are true copies of the official record of the Bureau of Mines in the matter of the assessment of civil penalty against M. Y. Coal Company M. Y. No. 1 Mine Clymer, Indiana County, Pennsylvania Bureau of Mines Case No. 2307-2

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Bureau of Mines, Department of the Interior, to be affixed on the day and year first above written.

/s/ Everett Turner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: M. Y. Coal Company
Operator
Case No. 2307-2

August 4, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED April 11, 1972 DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

/s/ Everett Turner
ASSESSMENT OFFICER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240

ID: 36-02396-0

April 11, 1972

IN THE MATTER OF: Re: Mine: MY No. 1
M. Y. Coal Company Case No: 2307-2
Clymer, Indiana County, Pennsylvania

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on the for consideration and consideration having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that M. Y. Coal Company be and the same is hereby assessed a civil penalty in the amount of one thousand three hundred twenty dollars ($1,320.00) for the following violation:

Violation No:	Date Issued:	Violation:	Assessment:
1 RJC	09-16-71	77.410	$ 25.00
1 SBR	11-17-71	104(i) Order 70.100	1,000.00
1 CWN	12-06-71	75.301	90.00
1 CWN	12-15-71	70.100	30.00
1 CLG	01-31-72	75.515	40.00
1 AGF	02-11-72	75.516	55.00
1 WFM	02-29-72	75.521	45.00
2 WFM	02-29-72	75.518	35.00

Total Assessed Amount $1,320.00

/s/ Everett Turner
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment
April 11, 1972

EXHIBIT "B"

Morton v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

ANSWER

Defendant, Edward Mears, Earl Bence, Charles J. Mears, Murray Martin, Rocco Yanity, Casmer Yanity and Tony Yanity, Individually and as partners t/a/d/b/a Yanity Brothers Coal Company a/k/a M. Y. Coal Company, through their attorney, Owens and Jacobs, respectfully submits that:

1. Admitted.

2. Denied, that this Court has no power to assume jurisdiction in a matter which violates the "due process" clause of the Fourteenth Amendment of the Constitution of the United States.

3. Admitted that Defendant is, and at all relevant times was, Edward Mears, Earl Bence, Charles J. Mears, Murray Martin, Rocco Yanity, Casmer Yanity and Tony Yanity, Individually and as partners t/a/d/b/a Yanity Brothers Coal Company, a/k/a M. Y. Coal Company, organized and existing under the laws of the Commonwealth of Pennsylvania; but it is denied that Defendant is subject to the Act (30 U.S.C. Section 819(a) and 29 U.S.C. Section 1355), and that he is within the jurisdiction of this Court.

4. Denied that a civil penalty in the amount of $680.00 was lawfully assessed against the Defendant and furthermore, Defendant has a full, just and proper defense to the said violation of Section 109(a) of the Act; it is further denied that Defendant failed to protest the Proposed Order of Assessment; it is also denied that the Proposed Order of Assessment became final on October 26, 1971.

5. Denied that a civil penalty in the amount of $1,320.00 was lawfully assessed against the Defendant and furthermore, Defendant has a full, just and proper defense to the said violation of Section 109(a) of the Act; it is further denied that Defendant failed to protest the Proposed Order of Assessment; it is also denied that the Proposed Order of Assessment became final on April 11, 1972.

6. Admitted that to date said assessment order has not been withdrawn, vacated, modified or reversed, but denied that therefore it is final for the said order violates the "due

process'' clause of the Fourteenth Amendment of the Constitution of the United States, provisions of the Act itself, and other relevant statutes because Defendant was not granted a hearing; nor was a hearing set at a reasonable time or convenient location; nor was the procedure for obtaining and prosecuting said appeal such that a person in Defendant's position could reasonably take advantage of the right if afforded.

7. Admitted that the Defendant has failed to pay said assessment because the penalty is against the law for the reasons stated in paragraphs 2, 3, 4, 5, and 6, and that Defendant feels that he owes no civil penalty.

WHEREFORE, Petitioner[*sic*] respectfully prays that the Court enter judgment against the Plaintiff and all proper costs be placed on Plaintiff.

[Filed November 27, 1972]

Morton v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants by their attorneys herewith move the Court for judgment on the pleadings, or, in the alternative, for summary judgment, on the ground that there exists no genuine issue of material fact, and defendants are entitled to judgment as a matter of law.

As more fully shown in respondent's attached Memorandum of Points and Authorities, the civil penalty assessment orders sought to be enforced by plaintiff Morton are legally invalid and unenforceable because:

1. Such orders were not lawfully issued pursuant to and in accordance with the civil penalty provisions of the Federal Coal Mine Health and Safety Act of 1969.

2. Such orders do not comply with and are contradictory to the express provisions of regulations adopted by the Secretary of the Interior governing assessment of civil penalties under Section 109(a) of said Act.

3. Such orders do not comply with established rules of administrative procedure and due process of law.

[Filed February 16, 1973]

Morton v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

ORDER OF COURT

And now, this 19th day of June, 1973, upon motion of Alexander L. McNaugher, Assistant United States Attorney, attorney for plaintiff, and upon consideration thereof, it is ORDERED and DECREED: that Paragraph No. 4 of the Complaint be amended to read as follows:

"4. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $680.000 was lawfully assessed against the defendants for violation of the Act. A true copy of the amended proposed order of assessment is attached hereto, made part hereof and marked Exhibit "A". Said amended proposed order of assessment, after defendants were given the opportunity for hearing, and, in the absence of any protest or request by the defendants for a hearing, became final on October 26, 1971."

that Paragraph No. 5 of the Complaint be amended to read as follows:

"5. Pursuant to Section 109(a) of the Act, a civil penalty in the amount of $1,320.00 was lawfully assessed against the defendants for violation of the Act. A true copy of amended proposed order of assessment is attached hereto, made part hereof and marked Exhibit "A". Said amended proposed order of assessment, after defendants were given the opportunity for hearing, and, in the absence of any protest or request by the defendants for a hearing, became final on April 11, 1972."

and that the defendant shall be given twenty (20) days to file an Answer to the above amended paragraphs.

/s/ Daniel J. Snyder Jr.
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROGERS C. B. MORTON, Secretary of Interior, United States Department of the Interior, et al

vs.

EDWARD MEARS, et al, d/b/a M. Y. Coal Company, et al

Civil Action 72-928

ORDER OF COURT

AND NOW, to-wit, this 28th day of June, 1973, after oral argument and upon due consideration of the record and the briefs submitted by counsel IT IS ORDERED, ADJUDGED AND DECREED that for the reason stated in the Memorandum of the Honorable Herbert P. Sorg in the case of *Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior vs. G. M. W. Coal Company, Inc.*, at Civil Action No. 72-890 (W.D. Pa. filed May 25, 1973), defendants' Motion for Summary Judgement will be granted. See also: *National Independent Coal Operators Association, et al vs. Rogers C. B. Morton, Secretary of The Interior, et al*, Civil Action No. 397-72 (D.C. D.C. 3/9/73); *Morton v. Delta Mining Co.*, Civil 72-857 (W.D. Pa. 5/25/73).

/s/ Daniel J. Synder Jr.
UNITED STATES DISTRICT JUDGE

Morton v. *Edward Mears, et al.*
No. 72-928, W.D. Pa.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment entered by Judge Daniel J. Snyder, Jr., United States District Judge, dated June 28, 1973.

SUPREME COURT OF THE UNITED STATES
No. 74-521

Rogers C. B. Morton, Secretary of the Interior,
Petitioner,

v.

Delta Mining, Inc., et al

ORDER ALLOWING CERTIORARI. Filed January 27, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 74-2066 and a total of one hour is allotted for oral argument.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U.S. Government Printing Office: 1975—570-333/119

Supreme Court, U. S.
FILED
JAN 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS, Delta Mining, Inc. and G.M.W. Coal Company IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED BLACKWELL
1707 H Street, N.W.
Washington, D.C. 20006
Attorney for Respondents, Delta Mining, Inc., G.M.W. Coal Company.

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS, Delta Mining, Inc. and G.M.W. Coal Company IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE CASE IS MOOT

The controversy in this case concerns a body of civil penalty regulations which are no longer in effect. Published on January 17, 1971 as 30 C.F.R. Part 100, to implement the civil penalty provisions of the Federal

Coal Mine Health and Safety Act of 1969, such regulations were replaced by a new set of civil penalty regulations in April 1973. Shortly afterwards, on May 25, 1973, the District Court, Pittsburgh, Pennsylvania, granted the Respondents' Motion for Summary Judgment on the grounds that such regulations failed to conform with the Act which they were published to implement. Subsequently, the Third Circuit Court of Appeals affirmed the judgment of the District Court. The controverted regulations had thus ceased to be effective even before the district court decision in this case was rendered, as well as before the Third Circuit decision was rendered; consequently, the issues which the Petitioner seeks to raise about the regulations are moot.

The Petitioner concedes that the regulations in this case are no longer in effect; however, in point 1, page 13 of Petitioner's Brief, it is stated that "the decision below, if unreversed, will significantly interfere with the effective enforcement of the Federal Coal Mine Health and Safety Act." The Petitioner thus takes the position that, for the purpose of having the Third Circuit decision reviewed by this Court, the fiction should be indulged that the regulations have some kind of post-mortem substantive significance. The ultimate purpose of this fiction is to help the Interior Department to decide what to do with pending court cases which involve penalties assessed under the former regulations, and which are now enshrouded in doubt because of the split between the Third Circuit, which found the former regulations to to be invalid, and the District of Columbia Circuit, which found contra.[1] Although the Petitioner offers argument

[1] The Petitioner states that the cases filed or ready for filing in the district courts number more than 2,400 separate actions, involving an estimated 24,000 alleged violations. However, except [footnote continued]

in support of this position (pps. 13-17, Petitioners Brief), by attempting to portray the Interior Department's enforcement of the Mine Safety Act as hopelessly stultified by the doubts, uncertainty, and general adversity, resulting from the Third Circuit case, the argument really tells us nothing more than that the Department is faced with a few run-of-the-mill problems that are typical of the agency part of the government process. The argument is also unsound and misleading in several respects. It reveals, for example, that the Petitioner could have long ago dealt with the pending court cases simply by reassessing them under the new regulations. Yet, this obvious and practical course of action has not been taken because the Petitioner anticipates a legal challenge to the new regulations, which challenge, if successful, would render the reassessment work on the pending cases all in vain. The Petitioner fails to mention, however, that the same successful challenge to the new regulations would also render useless all assessment work performed under the new regulations since April 1973. Since this post-April 1973 work, according to the Petitioner, involves the assessment of 80,000 violations annually, it becomes quite clear that the pending court cases would be but a minor consideration indeed in the event that all such work were rendered useless because the new regulations succumb to legal challenge. Respondents submit, therefore, that the Petitioner's speculations about the possible illegality of the new regulations not only fails to justify his refusal to reassess the pending court cases under such regulations,

for the 150 cases presently pending in the Third Circuit, the Petitioner does not state how many cases have been actually filed in district courts. Thus, the elastic term "ready for filing" could well refer to a large number of violations which are contained in the files of the Justice Department, but which are not yet encompassed in a docketed case.

but also fails to demonstrate any reason why this Court should review the Third Circuit case.

Respondents further submit that there is an even more decisive reason to reject the Petitioner's entire argument insofar as it relates to the new regulations. The new regulations are in no way involved in the decision of the Third Circuit or in the decision of the District of Columbia Circuit. It is true that the Petitioner has made numerous references to the new regulations in the course of this litigation, primarily to speak about their legal adequacy in contrast to the comments here about their possible illegality; however, the most cursory reading of the Circuit Court decisions will conclusively demonstrate that the new regulations are not even indirectly involved in those decisions. It therefore follows that the Petitioner's argument about the invalidation of the new regulations, by some future litigation, cannot be said to have any bearing on the decision in the Third Circuit case.

The Petitioner's great emphasis on the "staggering task" entailed by the reassessment of the pending court cases (involving 24,000 alleged violations) appears to be a case of the right hand not knowing what the left hand has been doing. The Interior Department has already reassessed approximately 36,000 violations originally assessed under the former regulations.[2] The task merely involved

[2] On December 31, 1974, the Assessment Office of the Interior Department advised that 36,000 violations previously assessed under the former regulations were reassessed under the new regulations during the period May 1973 to July 1, 1974. The Office also advised that it is almost current on assessment of new violations, which is substantially contrary to the Petitioner's reference to the Department's assessment program as "already suffering from unacceptable delays and backlogs." (pgs. 15 & 16 of Petitioner's Brief)

the assignment of particular personnel to reassessment work while other personnel worked on new assessments. Moreover, since these reassessments were completed by July 1, 1974, and since they were made at a rate which would enable the court cases to be covered in a little more than seven months, one might well ask why the court cases were not put in the reassessment process when the 36,000 violations were completed. Had that been done, the task of reassessing the court cases would now be only a month or two away from completion. In any event, in view of what the Department has already done in the way of reassessment work, it seems far from accurate to refer to the reassessment of the court cases as a staggering task.

The Petitioner's point about voluntary settlements is also unsound. No one would question the importance and desirability of making voluntary settlements of penalty liability. However, Respondents do question the Petitioner's conclusion that such settlements have been adversely affected by the decision of the Third Circuit and the District of Columbia Circuit. We note that the Petitioner offers no information to show that more settlements were effected before this litigation commenced than were effected after it commenced. Nor does the Petitioner demonstrate how one can know that an operator's unwillingness to settle is attributable to the uncertainty created by the Third Circuit ruling, rather than to the facts, monetary impact, personalities, and other such circumstances involved in his particular case. We submit therefore that the Petitioner's point about voluntary settlements leaps too far, particularly since a large part of the reason why this litigation was undertaken by the Respondents is that appropriate voluntary settlements could not be worked out with the Interior Department's

Assessment Office. This condition changed, however, shortly after the decision of the judgment of the district court in this case and it is now almost routine for the Respondents to make voluntary settlements of civil penalties under the new regulations. And while the Respondents do not have access to the vast amount of data which is available to the Petitioner, the information that we do have strongly indicates that other operators, who could not effect settlements prior to this litigation, are now arriving at satisfactory settlements of civil penalties under the new regulations.

There are other flaws in the Petitioner's contention (point 1, page 13 of Petitioner's Brief) that regulations no longer in use have some continuing impact on the enforcement of the Mine Safety Act; however, Respondent submits that the foregoing adequately shows that the regulations involved in this case were replaced in April 1973 and that the issues concerning such regulations are therefore moot in the fullest sense of the term. Indeed, in view of the large number of violations being assessed under the new regulations (80,000 annually), one might well ask whether reversal of the Third Circuit decision would help or hinder the Petitioner in putting his assessment house in order. Suppose that the former regulations are validated. What would the Petitioner do about penalties which have been assessed under the new regulations? Would the Petitioner reassess such penalties under the newly validated former regulations? Or would the Petitioner turn again to the courts to obtain relief from a staggering task?

THE DECISION OF THE THIRD CIRCUIT IS CORRECT

The decision of the Third Circuit Court of Appeals has correctly resolved all of the issues concerning the former regulations. After a careful review of the controlling statutory language, its legislative history as interpreted by the Petitioner, the texts of the former regulations, and the Interior Department's assessment actions thereunder, the Third Circuit issued a simple, straightforward ruling that the plain import of the statutory terms must be followed in assessing civil penalties against mine operators and miners under the Coal Act. In making this ruling, the Third Circuit had the full benefit of the opinion of the contra decision rendered by the District of Columbia Circuit Court of Appeals.[3]

The opinion of the Third Circuit noted that the narrow question before it was whether the Interior Department's Civil Penalty Assessment Regulations (former 30 C.F.R. Part 100) were consistent with the requirements of the Coal Mine Health and Safety Act. The opinion then went on to issue a ruling which struck down, and properly so, the part of the regulations which permitted a proposed civil penalty assessment order to become final without accompanying findings of fact, even though such findings are expressly required by Section 109 of the Coal Act.

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[3]The Petitioner acknowledges that, unlike the situation in the Third, Fourth, and Sixth Circuits, Coal Act civil penalties cannot be enforced in the District of Columbia (since no coal mines are located there); however, the Petitioner ignores the substantive import of this fact, namely, that there is no split between two Circuits in which civil penalties can be enforced.

Section 109 (a)(1), as pertinent here, enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of violation."

Section 109 (a)(3) of the Act provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

The final assessment orders before the Third Circuit Court made no mention of the six statutory criteria as set out in Section 109 (a)(1), but merely set forth the Secretary's finding that a violation "did, in fact, occur." And since such orders did not contain express findings of fact, they did not satisfy the requirements of Section 109 (a)(3); however as noted by the Court, the orders were in apparent conformity with the then

applicable regulations, inasmuch as a "formal adjudication" of the orders had not been requested. In this state of the record the Court stated:

> "There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested."

The Third Circuit Court of Appeals was called upon to construe the controlling provisions of Section 109 of the Coal Act. It found such provisions to be plain and unambiguous on the face of the statute and that the contrary regulations must give way to the terms of the statute. That decision was and is correct and it should be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

FRED BLACKWELL
1707 H Street, N.W.
Washington, D.C. 20006
Attorney for Respondents,
Delta Mining, Inc.,
G.M.W. Coal Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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No. 74-521

ROGERS C.B. MORTON,
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Petitioner,

v.

DELTA MINING, INC.,
G.M.W. COAL COMPANY,
EDWARD MEARS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

JOHN L. KILCULLEN
Attorney for Respondent
Edward Mears, et al.

Of Counsel:

Webster and Kilcullen
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The present case is one of two cases now pending before the Court on petitions for certiorari to obtain review of Court of Appeals decisions involving penalty assessment functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act.

The other pending case, *National Independent Coal Operator's Association v. Morton*, No. 73-2066, seeks

review of a decision of the Court of Appeals for the District of Columbia Circuit reversing a district court judgment which held illegal and invalid the Secretary's penalty assessment procedures under 30 CFR Part 100 on grounds that they failed to conform with the statutory language of Section 109(a)(3) of the Act which requires that penalty assessment orders must be supported by a decision of the Secretary "incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted".

The extensive record in the *National Independent* case presents in its broadest scope the question of whether the Secretary may assess penalties without making and publishing factual findings. The record there relates to some 10,000 penalty assessment orders involving more than $20 million issued under the Part 100 assessment procedures from the time of their inception in January 1971 until the Secretary suspended and replaced such procedures in April 1973. The *National Independent* case thus presents the broad question as to the enforceability of several thousand assessment orders issued during the period the revoked procedures were in effect.[1]

[1] Respondents are amazed by the assertion at page 18 of the Petition that "the penalty for most of these violations is small – about the size of a traffic ticket". The penalties assessed against respondents here totalled $7895 for just three cases. The record in the *National Independent* case contains tabulations of hundreds of penalty assessment orders in amounts in excess of $5000 during a period covering only six months. The average penalty assessment order issued under the Part 100 procedures was in excess of $2000 – hardly in the category of traffic tickets.

In contrast to the *National Independent* case the factual record here is extremely limited, consisting only of assessment orders for which the Secretary sought enforcement in three cases filed in the U.S. District Court for the Western District of Pennsylvania. The district court in each of the three cases granted summary judgment for respondents on grounds that the assessment orders were unsupported by any decision or findings of fact by the Secretary. For example, in the first of the three cases, *Morton v. G.M.W. Coal Company*, the court stated:

> "...it is clear that the proposed orders of assessment as well as the final orders based thereon do not set forth 'findings of fact' concerning either the occurrence of a violation or the amount of the penalty assessed. The express language of the Act makes it equally clear that an order of assessment must be supported by a 'decision incorporating his (the Secretary's) findings of fact therein, that a violation did occur and the amount of the penalty which is warranted". (See text of the decision reproduced as Appendix D to the Petition).

The jurisdiction of the district courts to enforce penalty assessment orders is derived from section 109(a)(4) of the Act, which specifies that upon filing a petition for enforcement "the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued", and that:

> "The Court shall have jurisdiction to enter a judgement enforcing or setting aside in whole or in part the *order and decision of the Secretary* . . ." 30 USC Section 819(a)(4); emphasis added.

On the state of the record before it the district court below had no choice but to grant summary judgment

for respondents. Since the Court did not have before it in any of the three cases the requisite "order and decision of the Secretary" it could not, under section 109(a)(4), grant the Secretary's petition for enforcement. By reason of his failure to issue a decision incorporating his findings of fact respecting the occurrence of the alleged violations, and the amount of the penalty warranted for each such violation, the Secretary made it impossible for any court to review and determine the propriety of his assessment orders. The absence of an "order and decision" upon which the Court could act also placed his assessment orders beyond the jurisdiction of the district courts under Section 109(a)(4).

In summary, there is no substantive record here to permit this Court to decide broad legal questions regarding enforceability of the large mass of penalty assessment orders issued under the Part 100 procedures. The validity of such penalty orders turns upon the question of whether the Part 100 regulations were valid, and the ample record presented in the *National Independent* case provides the most suitable base for determination of that question.

Apart from the lack of substantive merit in the Petition here, respondents are constrained to note the extent to which the Petition incorporates unsubstantiated hearsay material such as the statement contained in footnote 9 on page 9, various figures cited on pages 15 and 16, "random sampling" of assessment actions referred to in footnote 24 beginning on page 18, and gratuitous comments regarding the sufficiency of the "new" Part 100 procedures published in July 1974. Since this case involves assessments under the

"old" Part 100 procedures we can see no materiality in the discussion of revised procedures adopted at a later point in time.

Finally, petitioners contention that reassessment of old cases would be "a staggering task" provides no justification for the Secretary's circumvention of the statutory provisions governing his penalty assessment functions. If the Secretary regards the statutory procedure too cumbersome to deal with a large number of assessment cases his proper recourse should be to seek amendment of the statute by Congress, rather than ask the courts to sanction his disregard of the statutory language as it now stands.

Respectfully submitted,

JOHN L. KILCULLEN

Attorney for Respondent
Edward Mears, et al.

Of Counsel:

Webster and Kilcullen
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20006

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No. 74-521

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OCTOBER TERM, 1974

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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REPLY MEMORANDUM FOR THE PETITIONER

In our petition for certiorari we stated that if the Interior Department were to attempt to reassess the backlog of cases involving penalties assessed under the old procedures, it would severely hamper the Department's efforts to process current violations and assessments (Pet. 13-16). In their opposition to the petition, respondents Delta Mining and G.M.W. Coal Company challenge the accuracy of our estimate of the number of cases involved and suggest that the petition exaggerated the extent of the burden involved (Pet. Opp. 4-5).

The Assistant Attorney General for the Civil Division accordingly asked the Interior Department to review again the accuracy of the estimates contained in our petition and to comment upon the respondents' assertions concerning the feasibility of rapidly reassessing the penalties in the pending cases.

The Department's reply (App., *infra*) provides a more accurate estimate of the number of cases involved, based on an audit conducted subsequent to the filing of the petition. It also explains in some detail why the Department remains of the view that the reassessment of the penalties involved would be a very burdensome undertaking that would severely hamper current enforcement efforts.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX

United States Department of the Interior
Office of the Solicitor
Washington, D.C. 20240
January 16, 1975

Honorable Carla A. Hills
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mrs. Hills:

You recently requested our views and comments upon respondent's reply brief filed before the Supreme Court in *Morton* v. *Delta Mining, Inc.*, No. 74-521. The portion of respondent's reply brief which you quoted is as disturbing to us as it is to you. The figures presented to you at the time of preparation of the petition for certiorari were provided by MESA's Office of Assessments and at the time given they were thought to be accurate by all concerned. However, subsequent to that time Departmental auditors in the course of an overall audit of Interior's assessment program noted that the most accurate figures available indicate about 2,350 cases involving 24,000 violations were referred to the Department of Justice for enforcement up until March of 1973. However, subsequent payments, settlements, and default judgments have reduced the number of cases outstanding to 2,050 involving 18,350 violations. This figure is subject to monthly change as reports of new settlements by U.S. Attorneys reach the Office of Assessments.

Respondent cavalierly suggests that MESA assessed a 36,000 violation backlog in thirteen months. This is intended to prove that reprocessing the 18,350 violations which

are before the U.S. courts, will be no real burden. That is a gross misstatement. In March of 1973 the Department was enjoined from using any part of the assessment procedures contained in 30 CFR Part 100 as it existed at that time. (An amended Part 100 has now been reinstated since August, 1974.) From March 1973 to October 1973, the Assessment Office struggled to assess violations currently being issued and to reassess about 36,000 violations which had been assessed under the prior system but which were in various stages of completion. Their efforts were not successful. They in fact fell further behind. In this emergency situation, the Administrator of MESA took personnel from the enforcement area to aid the assessment staff. Approximately 35 people were assigned to assessing the 36,000 violation backlog bringing the total work force to 74 assessors. The task required fourteen months in all. That the task was accomplished at all, is a tribute to their motivation and ability rather than an indication of how light a burden it was. It must be emphasized that people assigned to assessment work must have special training, skills and maturity. The people assigned were some of MESA's most qualified inspectors. Despite this, a training period of two months was necessary before these personnel were truly productive. Finally, the loan of these people could only be accomplished so long as the inspection corps was able to meet its statutory responsibilities of conducting a minimum of four health and safety inspections a year at each coal mine in the nation.

Today, the Assessment Office has a work force of 15 assessors and a backlog of 21,000 violations. In addition, it has a backlog of 5,000 conferences. To reprocess another 18,000 violations would be a tremendous setback to their efforts to achieve a current status. Moreover, additional people may well not be available to aid in this work.

As mentioned, the inspection force is required to conduct a minimum of four health and safety inspections per year in each coal mine. With the energy crisis, there has been a steady rise in new coal mines and the inspection force can ill afford to lose valuable manpower. In addition to this, these people have already begun this fiscal year's special programs which are designed to reduce fatalities. Any people who could be made available to work would need training. Finally, there would be the task of finding sufficient clerical support to process the additional work. With all these hurdles in mind, it is estimated that 300 man weeks would be needed to process these additional violations, should it be required. Moreover, the figure takes into account reprocessing new assessments and does not account for conference time. Conferences as mentioned already have quite a large inherited backlog. It is doubtful that the additional conferences generated could be handled simultaneously with the current conference backlogs. Finally, all of this may well be an exercise in futility in a large number of the cases where operators desire *de novo* court review and have deliberately exercised that option.

While Interior regrets that the earlier information was not the most accurate and with the understanding that present figures are still approximations, we believe that the preceding explanation clearly demonstrates that there would indeed be a massive administrative burden to reprocess these cases and that such a result would involve harmful cutbacks in our present enforcement program. That is not to say we could not do the job. Interior is committed to firm enforcement of the Act and this includes the vigorous use of its civil penalty authority. If the law requires these violations must be redone in order to be enforced, then we will have no alternative but to find the means to do it.

I trust this is some assistance to you with preparing any submission to the court you think appropriate. If you have any further questions or desire further assistance, please contact Mr. Robert W. Long, Associate Solicitor, Division of Mine Health and Safety; his telephone number is 235-1151.

Sincerely yours,
Kent Frizzell
Solicitor

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BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,
HARRIET S. SHAPIRO,
Assistant to the Solicitor General,
LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MICHAEL RODAK, JR., CLERK
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., G. M. W. COAL COMPANY, INC.,
AND EDWARD MEARS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. A, pp. 1a–16a), is reported at 495 F. 2d 38.[1] The opinion of the district court (Pet. App. D, pp. 21a–24a) is not reported.[2]

[1] The court of appeals opinion of March 20, 1974, was amended on June 12, 1974. The amendment corrected a statement in the original opinion respecting the issuance by the Secretary of substantive guidelines for assessing civil penalties (Pet. App. A, p. 12a). See *infra*, p. 16 n. 24.

[2] Three separate enforcement proceedings were consolidated in the court of appeals. The district court opinion in *Morton* v. *G.M.W. Coal Co., Inc.*, W.D. Pa., Civ. No. 72-890, is reprinted

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 17a–18a) was entered on March 20, 1974. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on June 4, 1974 (Pet. App. C, pp. 19a–20a). On August 23, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 1, 1974. The petition was filed on November 1, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to prepare a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has failed to exercise his right to an administrative hearing, and even though the penalty can be enforced only in judicial proceedings where the operator is entitled to a trial *de novo* on all disputed issues of fact.

STATUTES AND REGULATIONS INVOLVED

1. Sections 109(a)(1), 109(a)(3) and 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756–757, 30 U.S.C. 819(a)(1), 819(a)(3) and

in Pet. App. D. The district court orders in *Morton* v. *Delta Mining, Inc.*, W.D. Pa., Civ. No. 72–857 (App. 46), and *Morton* v. *Edward Mears, et al.*, W.D. Pa., Civ. No. 72–928 (App. 117), the two other consolidated cases, granted the operators' motions for summary judgment for the reasons stated in the *G.M.W.* opinion.

819(a)(4), are set forth in the Petition at pp. 3–5, and in the Addendum to this brief (Add., pp. 4–6).

Sections 2, 104(a), 104(b), 104(e) and 104(f) of the Act, 83 Stat. 742–743, 750–752, 30 U.S.C. 801, 814(a), 814(b), 814(e) and 814(f), are set forth in the Addendum (Add., pp. 1–4).

2. 30 C.F.R. Pt. 100, as promulgated on January 16, 1971 (36 Fed. Reg. 779–780), is set forth in Pet. App. E, pp. 25a–32a. This is the regulation under which the penalties in these cases were assessed.

30 C.F.R. Pt. 100, as modified on June 15, 1972 (37 Fed. Reg. 11861–11862), is set forth in the Addendum (Add., pp. 7–13). This is the regulation the district court enjoined in *National Independent Coal Operator's Association* v. *Morton*, No. 73–2066.

30 C.F.R. Pt. 100, as reissued effective August 1, 1974 (39 Fed. Reg. 27558–27561), is set forth in Pet. App. F, pp. 33a–56a. This is the regulation now in effect.

STATEMENT

1. *The statutory scheme.* The Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801, *et seq.* ("the Act"), establishes health and safety standards to protect the Nation's coal miners, and requires each operator of a coal mine and every miner to comply with such standards. Sections 2(g)(1) and (2) of the Act, 30 U.S.C. 801(g)(1) and (2). The mandatory health and safety standards are set forth in Titles II and III of the Act, 30 U.S.C. 841, 861, *et seq.* The implementing regulations are in 30 C.F.R. Pts. 70, 75 and 77. The Act requires the Secretary of

the Interior to assess and collect civil penalties for violations of these standards by coal mine operators.[3]

Section 103 of the Act, 30 U.S.C. 813, authorizes and requires representatives of the Secretary, that is, federal coal mine inspectors, to make frequent inspections of coal mines.[4] Section 104, 30 U.S.C. 814, establishes procedural mechanisms for finding and abating dangerous conditions and violations of mandatory health or safety standards in coal mines, including the issuance by federal inspectors of notices of violation

[3] The Act was passed after extensive congressional hearings into the problems of coal mine health and safety, occasioned by a coal mine disaster at Farmington, West Virginia, in November 1968 when 78 miners died. The House Report stated: "For too long the Congress has countenanced the passage of piecemeal measures which have failed to provide the Bureau with the enforcement power it needs. Too many injuries and too many lives have filled the gap left by inadequate laws. A strong law is necessary to protect the men who extract one of our Nation's most vital resources. Coal miners deserve the safest, healthiest work environment our technology will enable us to provide." H. Rep. No. 91-563, 91st Cong., 1st Sess. 6; Leg. Hist. 558, 563. The penalty provisions of Section 109 were enacted as one of the chief enforcement tools of the Act. S. Rep. No. 91-411, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39.

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (cited herein as "Leg. Hist.").

[4] At the time of the events giving rise to these actions, the Act was enforced by the Secretary's delegate, the Bureau of Mines, Department of the Interior. The Bureau's safety and enforcement functions have since been transferred to a newly created Mining Enforcement and Safety Administration, Department of the Interior. 38 Fed. Reg. 18665-18668, 18695-18696 (1973).

or withdrawal orders[5] on account of such violations and conditions.[6]

Section 109(a)(1) of the Act provides that the coal mine operator shall be subject to a civil penalty not exceeding $10,000 for each violation of a mandatory health or safety standard or any other provision of the Act. In determining the amount of the penalty, the Secretary is required to consider the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 819(a)(1).

The provision here in issue is Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), which provides that the Secretary may assess a civil penalty only after the person charged with the violation "has been given an

[5] If an inspection reveals a condition causing imminent danger, the coal mine inspector must order the operator to withdraw all persons from the mine or area affected until the danger is abated. Section 104(a), 30 U.S.C. 814(a). Similarly, if the operator fails to correct violations within a reasonable time, or if he repeatedly and unwarrantably permits significant violations of mandatory health or safety standards to occur, the coal mine inspector must also order that the operator withdraw all persons from the mine. Sections 104(b), 104(c), 30 U.S.C. 814(b), 814(c).

[6] Sections 104(e) and (f) require that these notices and orders be given promptly to the operator of the coal mine or his agent by the inspector, and that they be in writing and contain a detailed description of the conditions or practices constituting the condition or violation (Add., p. 4).

opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating when appropriate, an order therein requiring that the penalty be paid." The Section further requires that any hearings held under this Section shall be of record and subject to 5 U.S.C. 554 (the Administrative Procedure Act).

If the penalty is not paid, the Secretary must file a petition for judicial enforcement of the assessment order in the appropriate district court, generally the district where the mine is located. The court then determines all relevant issues *de novo,* and the operator has a right to a jury trial on any disputed issues of fact. 30 U.S.C. 819(a)(4).[7]

2. *Pertinent regulations and administrative proceedings.* The assessment orders the Secretary sought to enforce in the present cases were issued pursuant to 30 C.F.R. Pt. 100 (1972) (Pet. App. E, pp. 25a–32a).[8]

They were based on notices of violations and withdrawal orders issued to the respondents in 1971 and

[7] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act [relating to the propriety of withdrawal orders and the period of time permitted for abatement of noticed violations]." 30 U.S.C. 819(a)(4). See *infra*, p. 22 n. 27.

[8] 36 Fed. Reg. 779–780 (Jan. 1971). These regulations were modified in certain respects, not here significant, in June 1972. 37 Fed. Reg. 11861–11862, 30 C.F.R. Pt. 100 (1973) (Add., pp. 7–13).

early 1972. The notices served on Delta (Add., pp. 22–27) were typical. They charged violations of 30 C.F.R. 75.313 (1972) ("A methane monitor, approved as reliable by the Secretary, was not installed on the continuous miner in mains section," Add., p. 22); 30 C.F.R. 75.504 (1972) ("The hose conduit, used to protect the electrical wires leading from the junction box to the left cutter head motor was broken on the continuous miner," Add., p. 23); 30 C.F.R. 75.1600 (1972) ("Telephone service was not provided from the surface to the underground working section," Add., p. 24); 30 C.F.R. 75.1714 (1972) ("A self rescue device approved by the Secretary was not made available for each underground workman," Add., p. 25); 30 C.F.R. 77.400 (1972) ("The belt chain drive at the top of the storage bin was not guarded to prevent persons from coming in contact with the chain drive," Add., p. 26); and 30 C.F.R. 77.204 (1972) ("The opening around the belt drive and motor at the top of the storage bin was not covered to prevent persons from falling in the bin," Add., p. 27). See App. 28.

There were two withdrawal orders in these cases: G.M.W. received an imminent danger withdrawal order on November 21, 1971, which involved a violation of 30 C.F.R. 75.400 and 75.403 (1972), relating to a fire hazard.[9] Edward Mears received a withdrawal order on November 17, 1971, for failure to abate a vio-

[9] The order reported that "Loose coal was in excess of 3" deep for a distance of 80 ft. inby sight spad No. 160 in No. 3 Main Entry, for a distance of 80 ft. inby No. 3 Entry of 5 Left butt, in Nos. 1 and 2 Main Entries, and also for a distance of 40 feet in No. 3 Entry of 5 Left butt. The Rock dust was inadequate in the above described areas" (See App. 64, 87).

lation of the standard for respirable dust concentration, 30 C.F.R. 70.100 (1972) (App. III).

Each notice of violation and order of withdrawal served by an inspector on a coal mine operator was reviewed by an assessment officer of the Bureau of Mines, Department of the Interior, to determine the liability of the operator for a civil penalty, and the amount of the penalty to be proposed. 30 C.F.R. 100.4 (a) (1972). The assessment officer prepared and served a "Proposed Order of Assessment" upon the operator charged, 30 C.F.R. 100.4(b)(1) (1972), which specified the notice of violation (or withdrawal order) in question, and stated the amount of the proposed civil penalty. 30 C.F.R. 100.4(b)(2) (1972) (App. 9, 58, 61, 64, 108, 111).

The Part 100 procedures stated that, in determining the amount of the proposed penalty for an operator, the assessment officer was required to consider all relevant circumstances, "including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation." 30 C.F.R. 100.4(c) (1972); 30 C.F.R. 100.2(a) (1972). These are the six statutory factors that Section 109(a)(1) of the Act, 30 U.S.C. 819(a)(1), directs the Secretary to consider. Each proposed order indicated that the factors had been considered (see *e.g.*, App. 9, 61, 64).

Section 100.2(b) of the regulations stated that the amount of the proposed civil penalty "shall be within

guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act * * *." 30 C.F.R. 100.2(b) (1972).[10] Appendix A at the time of the violations in these cases[11] provided for a range between $5,000 and $10,000 for violations resulting in the issuance of imminent danger withdrawal orders (under Section 104(a) of the Act); a range between $1,000 and $5,000 for violations resulting in the issuance of other withdrawal orders (under Sections 104 (b), (c), (h) and (i) of the Act); a range between $100 and $1,000 for "serious violations"; and a range between $25 and $500 for other violations.[12] The operators were advised when they received the proposed orders that they had 15 working days from the receipt

[10] A proviso stated that a particular violation may warrant proposing a civil penalty more than or less than the range set forth in the guidelines. 30 C.F.R. pt. 100, Appendix A (1972).

[11] Appendix A to Part 100 was modified in June 1972. See 37 Fed. Reg. 11460, 11862 (Add., p. 13).

[12] The major proposed penalties here involved were $5,000 for a violation by G.M.W. Coal Co., Inc., resulting from an imminent danger withdrawal order, and $1,000 for a violation by Edward Mears, *et al.*, resulting from a withdrawal order. In addition, the Secretary proposed penalties ranging from $30 (for the failure to provide phone service to the working section) to $90 (for the unguarded belt chain drive) on the 6 notices of violation issued to Delta Mining; ranging from $25 to $100 on 10 notices of violation issued to G.M.W. Coal Co., Inc.; and ranging from $25 to $100 on 16 notices of violation (and $200 on a 17th) issued to Edward Mears, *et al.* The total penalties proposed were $375 against Delta, $5,525 against G.M.W., and $2,000 against Mears. After protest, one G.M.W. penalty was reduced from $100 to $50. See App. 9, 58, 61, 64, 108, 111.

of the order to "protest the proposed assessment, either partly or in its entirety." 30 C.F.R. 100.4(d) (1972).[13] If the operator failed to make a timely protest, he was deemed to have waived his right of protest, including his right of formal adjudication and opportunity for hearing, and the proposed assessment order became the final assessment order of the Secretary. 30 C.F.R. 100.4(e) (1972).

Each of the operators in this case protested[14] and the assessment officer reconsidered and reissued the proposed orders. 30 C.F.R. 100.4(g) (1972).[15] The operators again had 15 working days from receipt of the amended or reissued proposed order "to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." 30 C.F.R. 100.4(h) (1972).[16] Since none of

[13] This period was changed to 20 consecutive days in the June 1972 amendment. 30 C.F.R. 100.3(d) (1973).

The amendment also added the words "or petition for hearing and formal adjudication," but under the initial regulations the operator could, in his protest, also request a hearing. 30 C.F.R. 100.4(f) (1972).

[14] Delta's protest stated, among other things, that "the subject mine is a small mine producing approximately 8,000 tons of coal monthly," and that "the proposed penalties will have an adverse effect on the operator's ability to continue in business" (Add., p. 28).

[15] The proposed penalty for one of the G.M.W. violations was reduced from $100 to $50. See note 12, *supra.*

[16] In June 1972 this provision was clarified by substituting the words "or to reject such order in whole or in part" for "whereupon it shall become the final assessment order of the Secretary"; and adding a new sentence: "Unless the operator or miner charged files a timely petition for hearing and formal

the operators in these cases requested formal adjudication within 15 working days of receipt of the amended or reissued order, the orders became the final orders of the Secretary pursuant to the regulations, and thus subject to enforcement in the district court when they were not paid forthwith.[17]

In any case in which an operator did make a timely request for a formal hearing (by so indicating in his protest, or in response to a reissued or amended proposed assessment order), the assessment officer was required to forward the matter to the Office of the Solicitor, Department of the Interior, whereupon a petition to assess a penalty would be filed by the Solicitor with the Office of Hearings and Appeals, Department of the Interior. 30 C.F.R. 100.4(i)(1) (1972); 43 C.F.R. 4.540(a) (1972).[18] The hearing would be conducted *de novo,* 30 C.F.R. 100.4(i)

adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary." 37 Fed. Reg. 11862 (June 15, 1972), 30 C.F.R. 100.3(h) (1973).

[17] See the "Proposed Order Affirmed" issued in the *Delta Mining* case on May 17, 1972 (Add., pp. 29–30). See also App. 30, 81; Pet. App. A, p. 5a. The administrative record in each case included formal findings by the assessment officer similar to the one in *Delta*: "I hereby find that the violations cited in the proposed order of assessment dated April 11, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein as final" (App. 8, 57, 60, 63, 107, 110).

[18] The petition was required to be served on the operator who was then provided with an opportunity to answer and a public hearing. 30 C.F.R. 100.4(i)(2) (1972); 43 C.F.R. 4.541, 4.544 (1972).

The Office of Hearings and Appeals, Department of the Interior, is comprised of administrative law judges and Appeals Boards. 43 C.F.R. 4.1 (1974).

(1972); 43 C.F.R. 4.544, 4.589 (1972);[19] the Bureau of Mines (represented by the Office of the Solicitor) had the burden of proving any alleged violation of a mandatory health or safety standard by a preponderance of the evidence, 43 C.F.R. 4.587 (1972);[20] and the administrative law judge was required to render a decision incorporating findings of fact and conclusions of law, 30 C.F.R. 100.4(i)(3) (1972), 43 C.F.R. 4.593 (1972). The decision was subject to review by the Secretary's delegate, the Board of Mine Operations Appeals. 43 C.F.R. 4.1(b)(4), 4.500(a)(2), 4.600 (1972).[21]

Whether or not the operator has requested formal adjudication, he may obtain *de novo* judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. 819(a)(4).

3. *District court proceedings.* The Secretary filed complaints against each of the respondents in October and November, 1972, alleging that the assessments in question had become final in the absence of requests for hearing; that the assessments had not been paid; and praying for judgment in the amount of each as-

[19] The hearing examiner was free to assess a different penalty, and was not bound by the prior proposed penalty or by the guidelines in Appendix A of Part 100.

[20] A June 1972 amendment to this section states explicitly that "in a penalty proceeding the Bureau shall have the burden of proving its case by a preponderance of the evidence * * *." 43 C.F.R. 4.587(a) (1973).

[21] These formal hearing procedures are for the most part the the same under the present regulations of the Secretary. See 39 Fed. Reg. 27561, 30 C.F.R. 100.7 (Pet. App. F, pp. 54a–55a); 43 C.F.R. 4.540, *et seq.* (1974).

sessment order (App. 5, 54, 104). Each of the respondent mine operators answered the complaint against it, denying liability (App. 10, 65, 113).

At a pre-trial conference held on February 14, 1973, before Judge Gourley in the *Delta Mining* and *G.M.W.* cases (which had been consolidated), the parties submitted a joint stipulation of facts (App. 18–19), and argued the legality of the Secretary's assessment procedures. Judge Gourley concluded that the Secretary's procedures were in compliance with the law, and that the two cases should be severed and set for separate *de novo* trials at which the government would have an opportunity to "prove [its] whole case" (App. 41–42). Judge Gourley then vacated the order consolidating the two cases (App. 44), and transferred both to Judge Sorg for trial (App. 45).

On March 9, 1973, while these cases were awaiting trial before the district court, the United States District Court for the District of Columbia enjoined the Secretary of the Interior from utilizing or enforcing the assessment procedures of Part 100, concluding that Section 109(a)(3) of the Act requires the Secretary to prepare a decision incorporating findings of fact in all penalty assessment determinations, whether or not a hearing is requested. *National Independent Coal Operators Association* v. *Morton,* 357 F. Supp. 509 (hereafter referred to as the "*NICOA*" case). As a result of this injunction, the Secretary suspended Part 100 on April 24, 1973, and replaced it with interim formal hearing pro-

cedures for all cases, pending an appeal of the *NICOA* decision. 38 Fed. Reg. 10085, 10086–10087.

On the basis of the district court decision in *NICOA*, the respondent mine operator in the *G.M.W.* case moved for summary judgment, contending that the Secretary's assessment orders were unenforceable since there had been no "decision incorporating * * * findings of fact" (App. 78–80). Agreeing with the district court's decision in *NICOA*, Judge Sorg concluded that the penalty assessment orders sought to be enforced did not comply with the requirement of Section 109 (a)(3) of the Act, since they did not set forth adequate findings of fact (Pet. App. D, pp. 21a–24a). The district court accordingly entered judgment in favor of the respondent mine operators in all three cases (App. 46, 52, 117).

4. *Appellate decisions.* The Secretary appealed the district court judgments in both circuits, arguing that Section 109(a)(3) requires a decision incorporating findings of fact only when the operator has requested formal adjudication and a hearing has been held. The Secretary also argued that, in any event, the availability of *de novo* judicial review in the district court enforcement action cures any shortcomings of this sort in the administrative procedures.

On February 11, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *NICOA*, concluding that Section 109(a)(3) "does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication."

NICOA v. *Morton*, 494 F. 2d 987, 994 (C.A.D.C.) (Pet. App. G, pp. 57a–73a, 73a).[22]

The decision of the court of appeals in *NICOA* was brought to the attention of the court below, but that court declined to follow it. In its decision of March 20, 1974, it held that the language of Section 109(a)(3) requires the Secretary to accompany each final assessment order with a decision incorporating findings of fact regarding the fact of violation and the amount of the penalty, "whether or not the operator requests a hearing" (Pet. App. A, pp. 9a, 16a). The court recognized the Secretary's concern "that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions"; it nevertheless concluded that it would be inappropriate "to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act" (*id.* at p. 13a).

In a footnote, the court of appeals stated that it had "considered and rejected" the Secretary's alternative argument that the *de novo* enforcement procedure in the district court cured any defects in the findings of fact accompanying the administrative assessment order (*id.* at p. 16a n. 32).[23]

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[22] This Court granted the Coal Association's petition for a writ of certiorari in that case, No. 73–2066, on January 27, 1975, and consolidated it with the present case for argument.

[23] On January 14, 1975, the District Court for the Eastern District of Kentucky concluded that an assessment order issued under the 1972 procedures complied with Section 109(a)(3), since it contained adequate findings of fact concerning the occurrence of the violation. *Morton* v. *Whitaker*, Civ. No. 74–96 (Add., pp. 14–18).

5. *Reissuance of Part 100 with substantive assessment guidelines.* A revised Part 100 became effective on August 1, 1974. 39 Fed. Reg. 27558–27561 (Pet. App. F, pp. 33a–56a). This current regulation establishes an "assessment formula" for determining proposed penalties under the criteria set forth in Section 109(a)(1) of the Act. Under this system, all proposed assessments are now accompanied not only be a recitation of the notice of violation and the amount of the penalty, but also by formula determinations ("penalty points") pertaining to each of the six statutory criteria.[24]

SUMMARY OF ARGUMENT

The court below concluded that Section 109(a)(3) of the Federal Coal Mine Health and Safety Act requires that all final assessment orders must be accompanied by findings of fact supporting the determination that the violation did occur and that the penalty assessed is appropriate. But we submit that the court of appeals in the *NICOA* case correctly read that Section as requiring such findings of fact only when a formal hearing has been held.

Section 109(a)(3) is designed to provide the operator with the opportunity for a public hearing; its provisions should be read in the light of that purpose as descriptive of the procedures which follow such a request. This reading of the Section is required by the provisions of both the House and Senate bills from which it is derived; the question at issue here arises only because limiting language in both provisions was deleted in conference. That deletion does not indicate an intent to make a substantive change in the requirement for findings.

None of the traditional reasons for requiring findings of fact in administrative proceedings applies when the operator chooses not to request a hearing, and the assessment can be enforced only after *de novo* judicial consideration. The operators have a right to be informed in every case, whether a hearing is requested or not, of the precise violation to which the assessment relates, and they have always been so informed. There is no similar need for detailed information supporting the appropriateness of the amount of the penalty assessed. Indeed, in regard to almost all of the violations involved here minimal penalties were assessed and we see no reason why the detailed information would be useful to the operators.

Finally, the operators' failure to request a hearing is equivalent to a default at the administrative level. There is nothing to indicate that Section 109(a)(3) was designed to preclude the enforcement of penalty assessment orders based on final administrative determinations resulting from express agreement or reasonable default procedures, either before or after a request for a hearing, without a decision incorporating findings of fact.

[24] Under the reissued Part 100, as in the case of the former Part 100, the operator's failure to request a hearing within a specified time (now 30 days) after service of a proposed assessment order (and opportunity for a conference) will result in a final assessment order enforceable in the district courts. 30 C.F.R. 100.4(c) (Pet. App. F, p. 51a).

The "assessment formula" system of assessing penalties was first developed in somewhat different form in April 1973, and was utilized thereafter in connection with interim formal hearing procedures until Part 100 was reissued effective August 1, 1974. See 38 Fed. Reg. 10086 (Apr. 24, 1973). See also *NICOA* v. *Morton*, 494 F. 2d 987, 989 n. 12 (C.A.D.C.) (Pet. App. G, p. 61a n. 12).

ARGUMENT

SECTION 109(a)(3) OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 DOES NOT REQUIRE THE SECRETARY OF THE INTERIOR TO PREPARE A "DECISION INCORPORATING * * * FINDINGS OF FACT" IN A CIVIL PENALTY ASSESSMENT CASE IN WHICH THE COAL MINE OPERATOR FAILS TO REQUEST AN ADMINISTRATIVE HEARING

At issue in these cases is the meaning of the requirement in Section 109(a)(3) of the Federal Coal Mine Health and Safety Act for a "decision incorporating his findings of fact therein * * *." According to the court of appeals in this case the language requires that all final assessment orders be accompanied by findings of fact supporting the conclusion that the violation did occur and supporting the application of the statutory criteria for determining the amount of the penalty (Pet. App. A, pp. 9a, 13a). The court of appeals in the *NICOA* case disagreed, reading Section 109(a)(3) as descriptive of the formal adjudicative process available upon the mine operator's request; it thus concluded that the disputed phrase simply described the procedures ancillary to the requested hearing (Pet. App. G, pp. 65a, 68a). This is, we believe, the correct construction in light of the wording and context of Section 109(a)(3), the legislative history of that Section, and the underlying purpose of the Section and the Act.

A. THE WORDING AND CONTEXT OF SECTION 109(a)(3) SUPPORT THE CONCLUSION THAT THE REQUIREMENT FOR DECISIONS INCORPORATING FINDINGS OF FACT IS ANCILLARY TO THE HEARING REQUIREMENT.

We begin, as we must, with the language of Section 109(a)(3):

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

The court below thought that the "plain import" of the statute is that whenever the Secretary assesses a civil penalty this must be done in a decision incorporating findings of fact that a violation did occur and that the penalty assessed is warranted (Pet. App. A, p. 9a).

In our view, however, the statutory language requires a decision incorporating findings of fact only when the mine operator has taken advantage of his "opportunity for a public hearing." The language following that phrase, rather than imposing a general requirement applicable to the assessment of all penalties, simply describes the nature of the formal adjudication that must take place when a hearing is requested. Thus, when a public hearing is held, the operator is entitled to a determination, by "decision incorporating * * * findings of fact," that the violation occurred and that the penalty is warranted. The decision resulting from the hearing, if adverse to the operator, will include an order that the penalty be

paid. And the hearing must be of record and subject to 5 U.S.C. 554.[25]

This, we believe, is the more natural reading of the Section. The phrase "a decision incorporating his findings of fact" traditionally refers to the end product of the public hearing conducted in conformity with Section 5 of the Administrative Procedure Act (APA), 5 U.S.C. 554, namely, a decision containing "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." *Automotive Parts & Accessories Association* v. *Boyd,* 407 F. 2d 330, 337 (C.A.D.C.).

On the other hand, the court of appeals thought that the reference in Section 109(a)(3) to Section 5 of the APA "tends to indicate that findings are required when a violator does not seek a hearing as well as when he does" (Pet. App. A, p. 10a). Otherwise, the court stated, the "findings of fact" phrase would be surplusage because Section 5 of the APA also requires the decisionmaker to make such findings after a hearing.[26] The court therefore concluded that the canon against construing statutory language to be mere surplusage supported its interpretation.

It is difficult to see the force of this. In the first place, it is hardly clear that the "findings of fact" lan-

[25] 5 U.S.C. 554, originally Section 5 of the Administrative Procedure Act, establishes general rules for formal administrative adjudications, including notice of hearing, Section 554(b); consideration of facts and arguments, and issuance of a decision in the absence of settlement by consent, Section 554(c); and rules applicable to the decision maker, Section 554(d).

[26] Actually, Section 5 of the APA does not itself state that the decision maker shall make findings of fact; the requirement is derived from Section 8 of the APA (5 U.S.C. 557(c)), which Section 5(d) refers to (see p. 21, *infra*).

guage in Section 109(a)(3) is here surplusage unless it applies when no hearing is held. Congress could have thought that if it had simply referred to Section 5 of the APA without more, findings of fact *after a hearing might not be required.* Section 5 of the APA does not mention findings of fact, but in subsection (c) refers to Section 8 of the APA (5 U.S.C. 557), which requires such findings for hearings in accordance with Section 7 (5 U.S.C. 556). But Section 7 applies only to hearings required by Section 5 and in this situation the hearings are required instead by the Federal Coal Mine Health and Safety Act. (Section 5 would not have required a hearing on the Secretary's assessment order for the reasons set forth below.)

Moreover, the court approached the inquiry from the wrong angle. Given the structure of Section 109 (a)(3), the question should have been why Congress invoked Section 5 of the APA at the end of Section 109(a)(3) after it had already required an opportunity for a hearing and findings of fact.

Had the court asked that question, the answer would have been apparent. Section 5 of the APA sets forth a number of procedural requirements relating to notice, pleadings, time and place of the hearing, and the qualifications of the presiding officer, none of which are even touched upon in Section 109 (a)(3) of the Act at issue here. By referring to this provision of the APA, Congress thus made these procedures—and the considerable body of judicial opinions interpreting them—applicable when hearings are held.

In order to accomplish this aim, Congress had to refer expressly to Section 5 of the APA since it

otherwise would not have applied. Section 5 of the APA, 5 U.S.C. 554(a)(1), provides that the Section applies to every case of adjudication required to be determined on the record after an agency hearing except to the extent there is involved "a matter subject to a subsequent trial of the law and facts de novo in a court." Yet Section 109(a)(4) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 819(a)(4)—which immediately follows the provision in question here—provides for a trial *de novo* of all relevant issues pertaining to the imposition and amount of a civil penalty when the Secretary sues for enforcement.[27] Upon request of the mine operator in such a trial, disputed issues of fact shall be submitted to a jury. In light of this, the striking feature of Section 109 in general is that mine operators are even given the opportunity for a hearing before the Secretary, which is a departure from traditional administrative practice when trial *de novo* is available (see p. 6, *supra*).[28]

[27] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act." Section 109(a)(4), 30 U.S.C. 819(a)(4). Thus, where an operator has previously filed a petition for review in a court of appeals under Section 106 of the Act, all issues which were or could have been litigated by the operator in that proceeding are *res judicata* in any subsequent penalty enforcement proceedings when the court of appeals judgment becomes final. See H. Conf. Rep. No. 91-761, 91st Cong., 1st Sess., 71-72; Leg. Hist. 1033-1034.

In the present cases, none of the respondent operators filed such petitions for review relating to the facts involved in the present enforcement actions; thus this limitation on *de novo* judicial review under Section 109(a)(4) has no application here.

[28] Indeed, where *de novo* judicial review is available before taxes or assessments must be paid, this Court has rejected the

Although the opportunity for a hearing afforded by Section 109(a)(3) perhaps can be explained on the basis of Congress' desire to have disputes settled at the administrative level, it is difficult to imagine why Congress would have required the Secretary to make findings of fact when the operator failed even to request an administrative adjudication. Indeed, if Section 109(a)(3) meant—which it does not—that findings of fact must accompany assessment orders despite the operator's failure to invoke the hearing process, it would still be at least arguable that, even in the absence of such findings, the orders are nevertheless enforceable. It is hardly apparent that the operator suffers any prejudice by the lack of findings in this situation, and the general rule is that procedural defects at one level are not fatal when *de novo* review is available at another level. See *Pittsburgh S.S. Co.* v. *Brown*, 171 F. 2d 175, 178 (C.A. 7); *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F. 2d 281, 290 (C.A.D.C.).[29]

While we therefore believe that the court below erred in interpreting Section 109(a)(3), and that the Sec-

contention that any hearing at all must be held at the administrative level to satisfy due process. See *Nickey* v. *Mississippi*, 292 U.S. 393, 396; *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 710-712. Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738-739; *Lichter* v. *United States*, 334 U.S. 742, 791-792.

[29] Administrative findings become immaterial when there is a *de novo* trial in court. *Pittsburgh S.S. Co.* v. *Brown*, *supra*, 171 F. 2d at 178. It is therefore difficult to see the relevance of the statement by the court below (Pet. App. A, p. 11a) that "[j]udicial review of a final administrative determination is heralded as a right, and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings."

retary's reading is the correct one in light of the language and context of the statute, we are content to assume [30] that Section 109(a)(3) is reasonably susceptible of either meaning and that we must look elsewhere for help. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived * * *." *United States* v. *Fisher*, 2 Cran. 358, 386 (Marshall, C.J.).[31]

B. THE LEGISLATIVE HISTORY OF SECTION 109(a)(3) CONFIRMS THAT FINDINGS OF FACT ARE REQUIRED ONLY WHEN A HEARING IS REQUESTED AND HELD.

The legislative history of Section 109(a)(3) indicates that Congress intended to require decisions incorporating findings of fact only when a hearing had been requested and held. Section 109(a)(3) reached its present form as a result of a compromise between the slightly different Senate and House bills.

The relevant language of the House bill, Section 109 (b) of H.R. 13950, 91st Cong., 1st Sess., provided (115 Cong. Rec. 32064; Leg. Hist. 932):

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such an operator an opportunity for a hearing *and, in accordance with the request, determine by decision* whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised. [Emphasis added.] [32]

Similarly, the Senate bill, Section 308(a)(3) of S. 2917, 91st Cong., 1st Sess., provided (115 Cong. Rec. 28256; Leg. Hist. 546):

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title 5 of the United States Code shall apply to any such hearing and decision. [Emphasis added.][33]

Under either the Senate or House version of what became Section 109(a)(3), a decision incorporating findings of fact would have been required only when a

[30] As did the court of appeals in *NICOA*: "Section 109(a)(3) is logically capable of two different constructions." Pet. App. G, p. 64a.

[31] Concluding that the "plain import" of Section 109(a)(3) was that the Secretary must make findings of fact to accompany every final assessment order, the court below questioned whether it was "even appropriate" to resort to legislative history (Pet. App. A, p. 9a and n. 15). But as Mr. Justice Holmes observed in *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48, the plain meaning doctrine "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Here, such evidence does exist, as we next discuss.

[32] The House Report explained the purpose of this subsection simply by stating that it "gives the operator an opportunity to obtain a hearing before the Board [Federal Coal Mine Health and Safety Board of Review] before being required to comply with an order assessing a penalty." H. Rep. No. 91-563, 91st Cong., 1st Sess. 37; Leg. Hist. 558, 594.

[33] As we discussed above, the court of appeals sought to support its interpretation of Section 109(a)(3) by stating that Congress would not have made the finding of fact requirement applicable only to decisions after hearings, since the reference to 5 U.S.C. 554 would have been sufficient to impose such a requirement (Pet. App. A, p. 10a). But it is evident that the Senate bill, from which Section 109(a)(3) is derived, contains precisely that duplication—if it is one.

hearing was held. The Conference Committee adopted the Senate version, making minor changes in the Senate language. It also deleted the italicized portion of the Senate provision, thus creating the ambiguity in the final Act which is the subject of this lawsuit. But there is nothing to indicate that by this deletion, the Committee intended to change the substantive provisions of the two bills in this regard. Instead, the Committee apparently considered the deleted language unnecessary to express the common intention of both House and Senate versions of the Section.[34]

This interpretation is supported by the Conference Report, which notes:

> Both the Senate bill and the House amendment provided an opportunity for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. * * *

H. Conf. Rep. No. 91–761, 91st Cong., 1st Sess. 71; Leg. Hist. 963, 1033.

[34] See *NICOA* v. *Morton*, Pet. App. G, p. 71a. In *Burlington Truck Lines* v. *Iowa Employ. Sec. Comm'n*, 239 Iowa 752, 32 N.W. 2d 792, 797, the court stated: "The fact that the original draft of a bill contains language that is omitted in the final draft does not of necessity mean that the intent of the omitted portion is not still embodied in the bill as passed. The language may have been omitted because deemed unnecessary to a clear expression of the intent. Its omission is as consistent with that theory as with one that assumes the intent itself was abandoned. * * * This is especially true where (as here) the final draft is fairly susceptible of an interpretation consonant with the thought of the omitted part."

Indeed, there would be substantial doubt whether the Conference Committee had the authority to add a requirement, present in neither the House nor Senate bill, that findings of fact must be incorporated in decisions even in the absence of a hearing. Conference Committees are appointed to resolve differences between the bills committed to them; they are not authorized to make changes on matters regarding which both bills are in agreement. 2 U.S.C. 190c(a) (Senate conference reports); Rule XXVIII(3), Rules of the House of Representatives and § 546, Jefferson's Manual, H. Doc. No. 384, 92d Cong., 2d Sess. 526, 270–271.[35]

The language of the present Section 109(a)(3), as it emerged from the Conference Committee, must therefore be read as consistent with the provisions of the bills submitted to conference, which required findings of fact only after a hearing has been conducted.

C. IN LIGHT OF THE PURPOSES OF SECTION 109(a)(3), CONGRESS COULD NOT HAVE INTENDED TO REQUIRE FINDINGS OF FACT IN THE ABSENCE OF A REQUEST FOR A HEARING.

That Section 109(a)(3) requires a decision incorporating factual findings only after a hearing, as the legislative history indicates, is an interpretation consistent with the purposes served by findings of fact. On the other hand, to require such findings to be in-

[35] Even if the Conference Committee, appointed to resolve the differences between the Senate and House bills, had deemed it appropriate to add a requirement present in neither bill, it surely would not have done so without some express comment identifying the new requirement. Still less would it have done so while indicating that it was adopting the Senate version of the Section (*NICOA* v. *Morton*, Pet. App. G, p. 71a).

corporated in a decision even when the operator chooses not to invoke the hearing process, would impose an administrative burden far out of proportion to any benefits gained—a result Congress could not have intended.

Congress requires administrative findings for a number of practical reasons, such as facilitating judicial review, avoiding judicial usurpation of administrative fact finding functions, assuring more careful administrative consideration, helping parties plan their cases for rehearing or judicial review, and keeping agencies within their jurisdiction. Davis, *Administrative Law Treatise,* § 16.05, pp. 444–449 (1958 ed.).[36]

Here Congress' purposes in requiring administrative fact finding are adequately served by providing a full hearing followed by a formal decision whenever the mine operator requests it, and by providing *de novo* judicial consideration in enforcement proceedings. The provision that judicial review is *de novo* renders irrelevant the problem of judicial usurpation

[36] Most of the decided cases discussing the reasons for findings of fact have arisen in the context of discussions relating primarily to the adequacy of required hearings. Davis, *Administrative Law Treatise*, § 16.00, p. 559 (1970 Supp.). *E.g., Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94; *Capital Transit Co.* v. *Public Utilities Comm'n*, 213 F. 2d 176, 182–184 (C.A.D.C.), certiorari denied, 348 U.S. 816; *National Labor Relations Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–169; *Phelps Dodge Corp* v. *National Labor Relations Board*, 313 U.S. 177, 197; *D.C. Federation of Civic Ass'ns* v. *Volpe*, 459 F. 2d 1231, 1242–1243 (C.A.D.C.); *Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 851–853 (C.A.D.C.), certiorari denied, 403 U.S. 923; *Rayonier Incorporated* v. *National Labor Relations Board*, 380 F. 2d 187 (C.A. 5); *Coffey* v. *Jordan*, 275 F. 2d 1 (C.A.D.C.).

of administrative fact finding, and substantially eliminates the function of the administrative decision in facilitating judicial review. To the extent that the operator wishes to use the agency decision to help him prepare for judicial review, he may obtain a detailed statement of the agency's findings and conclusions by requesting a hearing. Similarly, careful administrative consideration and the avoidance of actions outside agency jurisdiction are assured by the ready availability to the operator of a formal hearing at which the agency will be required to prove its case. Finally, the factor of planning for a rehearing is not involved where an *initial* formal hearing has not been held. The initial informal procedures are simply a preliminary procedural step; if the operator is dissatisfied with the result, he may put the Secretary to his proof in a formal hearing, at which he is in no worse position than one facing the typical adverse agency action.

On the other hand, it would impose a substantial administrative burden on the Secretary to require a decision incorporating findings of fact—relating not only to the occurrence of the violation, but also to the factors underlying the penalty assessment—when no hearing has been requested. Approximately 80,000 notices of violation and 5,000 withdrawal orders are issued to coal mine operators each year, and the Act requires that a penalty be assessed for each violation. Thus, Congress could not have intended to require a formal decision with findings of fact in each uncontested case since such a requirement would certainly

render effective enforcement of the penalty provisions of the Act vastly more difficult.[37]

As Congress was doubtless aware, this would be particularly undesirable in the context of this Act, the underlying purpose of which is to protect the safety of coal miners. The penalty provisions of Section 109, one of the chief enforcement tools of the Act (S. Rep. No. 91-41, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39), should not be interpreted so as to increase substantially the difficulty of implementing them effectively without serving the legitimate procedural interests of the coal mine operators.[38]

[37] As noted *supra*, p. 16, the Secretary has, in response to the *Delta Mining* decision, instituted a formula system for assessing penalties, and thus in all cases now advises the operator of the basis for the amount of penalty assessed. We would argue that this constitutes a "decision incorporating * * * findings of fact" as required by the court of appeals' interpretation of Section 109(a)(3). But in anyevent, whether an assessment order should be enforced by the court should depend on the evidence adduced at trial, not on whether the Secretary's "findings" in the absence of a hearing were sufficiently detailed. Moreover, although the present formula system may obviate the problem in this case for the future, it does not affect the enforceability of assessments made under the earlier Part 100 procedures. As to those assessments we would stress that Congress did not mandate a formula system in administering Section 109(a). Still less did it require the Secretary to issue *ad hoc* written explanations in every uncontested case.

[38] The court of appeals' belief that its interpretation was necessary to prevent arbitrary administrative action (Pet. App. A, p. 11a) is incorrect, since the operator who believes he is being treated arbitrarily can always request a hearing and decision before a final assessment order, and cannot in any event be made to pay a penalty except by a judicial enforcement proceeding in which he has the right to *de novo* review. Cf. *Farncomb* v. *Denver*, 252 U.S. 7, 11-12; *Palmer* v. *McMahon*, 133 U.S. 660, 668-669. Compare *Fuentes* v. *Shevin*, 407 U.S. 67; *Goldberg* v. *Kelly*, 397 U.S. 254; *Saxton Coal Mining Co.* v. *National Bituminous Coal Comm'n*, 96 F. 2d 517 (C.A.D.C.).

Nor is the cost and inconvenience to the operator of a formal administrative hearing a legitimate reason for requiring the Secretary to prepare formal findings when no such hearing is requested. Instead, the operator's alternative of accepting the proposed penalty assessment or challenging it in administrative proceedings is entirely adequate to protect his interest (see *infra*, pp. 34-47). If an operator, following a protest, is still dissatisfied with a proposed penalty, he should request a hearing at which specific evidence relevant to the imposition and amount of penalty may be adduced. Only then will there be a suitable record developed upon which a "decision incorporating * * * findings of fact" may be based.

[39] It is evident that the operators in these cases knew precisely the violations with which they were charged. (See App. 9, 28, 58, 61, 64, 69-70, 108, 111).

[40] There was one $200 assessment. See note 42, *infra*.

To be sure, the operator should be entitled in every case, whether a hearing is requested or not, to be informed of the violation for which the penalty is assessed. But a decision incorporating findings of fact is not necessary for this purpose. The proposed notices of assessment provide such information in all cases by identifying specifically each notice of violation upon which they are based.[39]

Beyond this, there is no reason why the operator who does not desire a hearing should be entitled to findings of fact setting forth the basis for the Secretary's exercise of his discretion in determining the appropriate penalty. In all but three of the assessments for individual violations in these cases, the amount of the proposed, and final, administrative penalty assessment was between $25 and $100,[40] although a penalty of up to $1,000 would have been within the regulatory guidelines for serious violations, and up to

$500 for nonserious violations. 30 C.F.R. Pt. 100, Appendix A (1972) (Pet. App. E).[41]

The remaining violations in these cases were assessed at $5,000 and $1,000. The $5,000 assessment was against G.M.W. for a violation resulting in an imminent danger withdrawal order (App. 64). Under the guidelines, which reflected the gravity of the violation (Section 109(a)(1)), such a violation was normally initially assessed at a range between $5,000 and $10,000. The $1,000 assessment against Edward Mears, *et al.*, was related to a violation of the ~~reparable~~ dust concentration standard, which resulted in a withdrawal order under Section 104(i) of the Act (App. 111). Under the guidelines in Appendix A, the minimum penalty suggested for this type of violation was $1,000.

In all of these instances, therefore, it is evident that the Secretary's findings would simply have explained why he exercised his discretion in favor of leniency to the coal mine operator[42] by imposing penalties at the lower limits permitted by the guidelines.[43] Requir-

[41] These cases involve 33 notices of violation (see n. 12, *supra*). Final assessments of $100 were made in 6 of them: 5 of these violations were evidently serious, as was the one on which an assessment of $200 was made. Thus, the penalties for these 5 violations were in the lower range of the penalties.

The classification of violations as 'serious' and 'nonserious' was deleted in the June 1972 revisions of the regulations.

[42] The only possible exceptions in 35 violations are the $200 penalty assessed against Mears for failure to timber the roof at several entrances to its mine (App. 108), and one $100 penalty assessed against G.M.W.

[43] Specifically, it appears in these cases that there was no significant history of previous violations, and that the operator abated the violations within the time permitted. The appropriateness of the penalties to the size of the business of the operator, and the effect of the penalties on the operator's ability to continue in business were apparently not applied adversely, and the gravity and negligence factors were evidently applied with overall leniency.

ing the disclosure of the factual basis on which he acted in making these decisions would not have aided the operators in challenging these assessments."

Of course, when the Secretary assesses penalties which are not at the lower levels of those permitted under published guidelines, the operator may wish to know more about the way in which the Secretary applied the statutory criteria. In those cases, the

The Secretary published proposed rule making in August 1972 which would have strengthened the preliminary procedures of Part 100, particularly in regard to evaluation of the six statutory factors governing the size of the penalty. See 37 Fed. Reg. 17395–17396 (Aug. 26, 1972). Interested persons were invited to submit written comments, suggestions or objections. As a result of the comments received the proposed amendments were revised in their entirety. 37 Fed. Reg. 24828–24830 (Nov. 22, 1972). The proposed revision was not adopted, partly because of the pending litigation in the *NICOA* case. The "assessment formula" system was later developed as the most satisfactory method of making proposed penalty assessments. See *supra*, p. 16.

[44] The penalty assessments at issue here are typical in this respect. The Department of the Interior has advised us that in a random sampling of 50 enforcement actions pending in the district courts, involving final assessments under the old Part 100 for 484 individual violations, the amount of the final assessment and number of violations were as follows:

Amount of assessment	*Number of violations*
$25 or less	207
$26 to $50	87
$51 to $100	75
$101 to $500	96
$501 to $1,000	5
$1,000 to $2,000	3
Over $2,000	11
Total	484

operator can obtain that information by requesting a hearing and putting the Secretary to his proof. But in the substantial numbers of cases[45] in which the size of the penalty itself indicates that the criteria were applied favorably, requiring findings showing the factors underlying the Secretary's decision to be lenient does not serve any interest of the operator. It merely imposes an unnecessary administrative burden on the Secretary.

Accordingly, it is not surprising that the Secretary has not read Section 109(a)(3) as requiring such findings where a hearing is not requested. But each proposed assessment order recites that a violation did in fact occur and refers to the notices of violation in the proposed order. To that extent, "findings of fact" are made; Section 109(a)(3) requires no more. This contemporaneous construction of the statute by the agency charged with its administration is of course entitled to great deference. See *Udall* v. *Tallman,* 380 U.S. 1, 16.

D. IN ENACTING SECTION 109(a)(3), CONGRESS DID NOT INTEND TO MODIFY THE GENERAL RULE THAT ADMINISTRATIVE DISPUTES MAY BE EFFECTIVELY RESOLVED, WITHOUT A HEARING OR FINDINGS OF FACT, BY EXPRESS SETTLEMENT OR BY REASONABLE DEFAULT PROCEDURES.

In the *NICOA* case, *supra,* the court of appeals observed that in situations where a statute requires a hearing prior to agency action, the courts have held that the agency need not conduct a hearing if no disputed issue of material fact exists (Pet. App. G, pp. 66a–67a). *E.g., United States* v. *Storer Broadcasting Co.,* 351 U.S. 192; *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39–44. See also *Weinberger* v. *Hynson, Westcott & Dunning,* 412 U.S. 609, 620–622. The same reasoning indicates that the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing (Pet. App. G, p. 68a). The mine operator should not be permitted to complain now of the lack of findings, when by simply requesting a hearing at the administrative level he would have been entitled to findings on all disputed material issues of fact and discretion.[46]

There is nothing to indicate that Section 109(a)(3) was intended to prohibit the settlement of penalty assessment cases either by reaching an express agreement on the amount of the penalty to be assessed, or by a default determination.[47] The Secretary's right to

[45] See not 44, *supra*

[46] The court below concluded that the operators sufficiently indicated their dissatisfaction with the penalties imposed here by lodging protests pursuant to 30 C.F.R. 100.4(d) and (f) (1972). (Pet. App. A, p. 15a). But the regulations provide that if the operator is still dissatisfied with the penalties assessed after his protest is considered, he may request a hearing. The operators failed to request such hearings.

[47] Where, in a formal hearing proceeding, the operator failed to file a preliminary statement or a response to a prehearing order, the hearing examiner could issue an order to show cause why the proceedings should not be summarily dismissed. 37 Fed. Reg. 11462, 43 C.F.R. 4.545(a) (June 1972). If the operator or miner failed to respond to such an order, or failed to appear at a hearing, the examiner was required to order the proceedings summarily dismissed and remanded to the assessment officer for entry of the last proposed order of assessment (issued under

utilize such procedures *after* a hearing has been requested could hardly be doubted.[48] It is clear that administrative disputes may be compromised by default or waiver of a hearing or other procedural right. There is no reason why administrative disputes may not be similarly compromised prior to the initiation of a formal hearing. See, *e.g., Lichter* v. *United States,* 334 U.S. 742, 789–793; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 226, 228; *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 287; *McGregor* v. *Hogan,* 263 U.S. 234, 238; *Ross* v. *Stewart,* 227 U.S. 530, 537–539; *Reetz* v. *Michigan,* 188 U.S. 505, 509.

In this respect, the provisions of Part 100 were "default" provisions, providing procedures allowing for preliminary settlement of penalty assessment cases, and "default" determinations (based on the last

30 C.F.R. Pt. 100) as the final assessment order of the Secretary. 37 Fed. Reg. 11462, 43 C.F.R. 4.545(b) (June 1972).

For the current default procedures at the formal hearing stage, see 43 C.F.R. 4.544 (1974).

[48] The relevant provisions of the Administrative Procedure Act, 5 U.S.C. 554 (expressly referred to in Section 109(a)(3) of the Federal Health and Safety Coal Mine Act) specifically encourage the settlement or adjustment of cases without hearing or decision. Section 554(c) requires the agency to give all interested parties an opportunity for—

"(1) the submission and consideration of facts, arguments, *offers of settlement, or proposals of adjustment* when time, the nature of the proceeding, and the public interest permit; and

"(2) *to the extent that the parties are unable so to determine a controversy by consent*, hearing and decision on notice and in accordance with sections 556 and 557 of this title" (emphasis added).

proposed assessment) if an operator did not request a formal adjudication. These procedures of Part 100 were reasonable and fully consistent with the policies of the Administrative Procedure Act and the Federal Coal Mine Health and Safety Act. There is nothing in the language of Section 109(a)(3) of the Coal Mine Act which indicates any congressional intent to preclude such procedures; the history and policies underlying this legislation support them.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

MARCH 1975.

ADDENDUM

ADDENDUM

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ADDENDUM

Public Law 91–173, December 30, 1969

83 STAT. 742

An Act To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

30 U.S.C. 801

FINDINGS AND PURPOSE

SEC. 2. Congress declares that—

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the industry.

30 U.S.C. 814

FINDINGS, NOTICES, AND ORDERS

SEC. 104. (a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except

570-342—75——3

those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

* * * * * * *

(e) Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering.

(f) Each notice or order issued under this section shall be given promptly to the operator of the coal mine or his agent by an authorized representative of the Secretary issuing such notice or order, and all such notices and orders shall be in writing and shall be signed by such representative.

30 U.S.C. 819

PENALTIES

SEC. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In

determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time pre-

scribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

37 Fed. Reg. 11861–62 (June 15, 1972)

30 C.F.R. Pt. 100 (1973)

RULES AND REGULATIONS

TITLE 30—MINERAL RESOURCES

CHAPTER I—BUREAU OF MINES,
DEPARTMENT OF THE INTERIOR

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

Part 100—Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

On June 8, 1972, appearing in 37 F.R. 11459, the Department of the Interior published amendments to the procedural rules applicable to hearings in civil penalty cases under the Federal Coal Mine Health and Safety Act of 1969. These amendments were primarily contained in Part 4, Title 43, Code of Federal Regulations with conforming amendments in Part 100, Title 30, Code of Federal Regulations. To provide the public with an opportunity to become familiar with the new procedure and insure an orderly changeover, the regulations were not to be effective until June 15, 1972. However, in making these conforming amendments, §§ 100.3 (d), (e), and (f) which should have been amended were inadvertently omitted. The purpose of this document is to properly conform § 100.3. In making these conforming amendments § 100.3(h) has also been modified. These conforming amendments to § 100.3 make

clear that a party may petition for hearing either upon receipt of the initial proposed order of assessment or upon receipt of an affirmed or amended proposed order of assessment. In addition, the time periods for filing an informal protest or a formal petition for hearing are made identical.

These procedural rules are used extensively throughout the coal mining industry and are often used by parties who are not attorneys. To allay any uncertainty these parties may have and to provide a complete and convenient reference to Part 100, the Department has decided to republish Part 100 as amended in its entirety. These amendments to Part 100, Title 30, Code of Federal Regulations, are effective June 15, 1972.

RICHARD R. HITE,
Deputy Assistant Secretary
of the Interior.

JUNE 13, 1972.

Part 100, Title 30, Code of Federal Regulations is revised and republished to read as follows:

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Procedures for assessment of civil penalties; protest procedures.
100.4 Hearing procedures.
100.5 Formal penalty assessment.

Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91–173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration: (1) The operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be

reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether operator was neglect, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 20 days from the date of receipt of the Proposed Order of Assessment to either protest the proposed assessment, either partly or in its entirety, or petition for hearing and formal adjudication.

(e) Where an operator or miner fails to either timely protest a proposed assessment or petition for hearing, he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Office may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 20 days from the date of receipt of an amended or reissued proposed order to accept the proposed order, or to reject such order in whole or in part and petition for hearing and formal adjudication. Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or

reissued proposed assessment order shall become the final assessment order of the Secretary.

§ 100.4 Hearing procedures.

An operator or miner who desires a hearing and formal adjudication shall file a petition for hearing with the Office of Hearings and Appeals in accordance with the procedures set forth in Title 43 Part 4 §§ 4.540 et seq. The address of the Office of Hearings and Appeals is 4015 Wilson Boulevard, Arlington, Va. 22203.

§ 100.5 Formal penalty assessment.

(a) In accordance with the procedural rules provided in Part 4, Title 43, Code of Federal Regulations, a hearing examiner or the Board of Mine Operations Appeals (both in the Office of Hearings and Appeals) shall thereafter issue an order based on findings of fact and conclusions of law.

(b) In assessing a civil penalty against an operator or miner, a hearing examiner or the Board of Miner Operations Appeals shall determine de novo the amount of the civil penalty for each violation in any amount not to exceed in the case of an operator, $10,000, and in the case of a miner, $250.

(c) In determining the existence of a violation or assessing a civil penalty thereon, neither the hearing examiner nor the Board is bound by the provisions or guidelines in this part relating to the making of proposed assessments.

Appendix A

Guidelines for Assessment of Penalties

Type of violations	*Penalty range (in dollars)*
1. Mine operators:	
A. Violations resulting in the issuance of imminent danger withdrawal orders	5,000–10,000
B. Violations resulting in the issuance of other withdrawal orders	1,000–5,000
C. Other violations	25–1,000
2. Miners: Smoking or the carrying of smoking materials, matches, or lighters	25–250

Note: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc. 72-9053 Filed 6-14-72; 8:51 am]

(13)
(13.)

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, PIKEVILLE

Civil Action No. 74–96

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, PETITIONER

vs

EARL WHITAKER, d/b/a E & K COAL COMPANY WOOTON, LESLIE COUNTY, KENTUCKY, RESPONDENT

Memorandum Opinion and Order

The Respondent, Earl Whitaker, doing business as E & K Coal Company, has filed a Motion to Dismiss the civil penalty assessment action filed by the Secretary of the Interior (hereinafter Secretary) under 30 U.S.C. 819(a)(4) for alleged violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* Respondent attacks the sufficiency of the Proposed Order of Assessment upon the ground that the Secretary failed to incorporate findings of fact into the Order sought to be enforced. Several other grounds are asserted in support of the Motion to Dismiss but are found to be without merit.

This Memorandum Opinion and Order is filed because the Sixth Circuit has not had opportunity to pass upon what is argued to be a material question of statutory construction upon which the Third Circuit and the District of Columbia Circuit have reached different conclusions. Upon hearing and consideration of the question I do not believe it is well made and will be overruled for the reasons which follow.

There is no material reason to state in detail the operative facts of this case since the ground for dismissal is dominantly a question of law. However, it should be noted that as a result of on-premises mine inspections by Inspector Charles A. Miller the Respondent was cited for violation of a number of safety regulations occurring during the summer of 1971. On November 8, 1971 the Secretary issued a Proposed Order of Assessment. Respondent remonstrated through counsel and on February 17, 1972 an Amended Proposed Order of Assessment was filed. The amendment involved a reduction in the aggregate amount of the proposed penalty from Eight Thousand One Hundred and Seventy-Five ($8,175.00) Dollars to Six Thousand One Hundred and Ten ($6,110.00) Dollars but did not alter any findings.

No timely request for a formal hearing on the issues was made.

Thereafter, the Secretary brought this action for the enforcement of the civil penalty assessment Order. As the attack goes directly to the sufficiency of the Order, it is set out in full:

"UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., November 29, 1972.

Re *E. and K. Coal Company,* Operator.

Case No. 1977–1.

I hereby find that the violations which were cited in the amended proposed order of assessment dated February 17, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein for those violations as final.

EVERETT TURNER,
Assessment Officer.

Certificate of Service

I hereby certify that a copy of the foregoing was sent to the operator, certified mail, return receipt requested on November 29, 1972.

EVERETT TURNER,
Assessment Officer.

This decision was filed pursuant to the statutory directive contained in 30 U.S.C. 892(a)(3) which states:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given the opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

There is no question about the Respondent being offered a hearing. The administrative record is conclusive on this point. At issue, then, is the duty of the Secretary in reporting his decision making where no hearing is involved. This is the question over which the District of Columbia Court of Appeals and the Third Circuit Court of Appeals have arguably differed. In *Morton* v. *Delta Mining, Inc.,* 495 F. 2d 38 (3d Cir. 1974), the Court determined:

> . . . that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount. 495 F. 2d at 43.

In *National Independent Coal Operators' Ass'n* v. *Morton,* 494 F. 2d 987 (D.C. Cir. 1974), the Court concluded:

> . . . the Act does not require the Secretary to prepare a formal decision unless the mine operator requests a formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of the violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including formal decision. The Act does not require a formal decision where no hearing is requested and issues are in dispute. 494 F. 2d at 994.

I am not persuaded that there is any necessary conflict between the circuits. The Third Circuit with manifest lucidity construes the statute as requiring "express findings" and the District of Columbia Circuit perceives no requirement for formal decision "unless the mine operator requests a formal adjudication". It is my opinion that both views are correct and do not conflict. To find a conflict it would be necessary to equate "express findings" with the concept of a formal opinion. That such terms are not synonymous is patently obvious. The view in the Coal Operators' Association opinion that "[t]he Act does not require a formal decision where no hearing is requested and no issues are in dispute" comports logically to the clear language of the statute.

In the case at hand the Secretary had for consideration the specifications of the unappealed charges and the amended penalty assessment amounts, on the one

hand, and the statement of objections augmented by affidavits on the other hand. The evidentiary question was whether the violations occurred. The Secretary's delegate expressly found that the violations charged did, in fact, occur. He further found by adoption the assessments to be appropriate in the individual cases. In my view the instant case shows the propriety of each of the cited circuit views.

The function of the decision of the Secretary is to serve as the basis for enforcement or as the scope of the issues for a trial *de novo*. 30 U.S.C. 819(a)(4). I have no difficulty in ascertaining from the Order and the administrative record the precise dates of violation, compliance where it was effected, the supporting statutory or regulatory sections involved or the amounts of the asserted penalty. Nothing material is left to speculation or conjecture and, although individual preferences for style and format may arise, it is not the function of this Court to arbitrate or prescribe for the Secretary matters of presenting his findings or making his record in a non-hearing case.

I find that the Order of November 29, 1972 substantially complies with the requirements of 30 U.S.C. 819(a)(3). I find that the provisions of the Administrative Procedures Act, 5 U.S.C. 554, are not applicable in the instant case.

Accordingly, IT IS ORDERED that the Respondent's Motion to Dismiss be, and it hereby is, OVERRULED.

This the 14th day of January, 1975.

H. DAVID HERMANSDORFER, *Judge*.

A True Copy Attest:

MARY F. BLALOCK

EXCERPTS FROM ADMINISTRATIVE RECORD IN DELTA MINING, INC.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., April 11, 1972.

ID: 36–03248–0.

Re Mine: Delta No. 1, Case No.: 2312.

Certified Mail, Return Receipt Requested.
Delta Mining, Incorporated,
Box 99,
State Line, Pennsylvania 17213.
Attention: Dwight L. Grove

GENTLEMEN: Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U. S. Bureau of Mines
Room 210
1725 K Street, N.W.
Washington, D.C. 20006

570-342—75——6

Failure to file a protest to the proposed assessment or request formal adjudication within the aforementioned time will be considered a waiver of your right to protest, including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying, please refer to the case number.

Payment of the assessment should be made in the form of a check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

EVERETT TURNER,
Assessment Officer.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C.

ID: 36-03248-0.
Re: Mine:: Delta No. 1. Case No: 2312.
In the matter of:

DELTA MINING, INCORPORATED

Stonycreek Twp,
Somerset County, Pennsylvania

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and consideration having been given to

all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

It is hereby ordered that Delta Mining, Incorporated be and the same is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars ($375.00) for the following violation:

Violation No.	Date issued	Violation	Assessment
1 JWH	Jan. 24, 1972	75.313	$55
2 JWH	do	75.504	80
3 JWH	do	75.1600	30
4 JWH	do	75.1714	60
1 JWH	Jan. 26, 1972	77.400	90
2 JWH	do	77.204	60

Total Assessed Amount $375.00.

EVERETT TURNER,
Assessment Officer.

Dated at Washington, D.C. and entered as the Proposed Order of Assessment April 11, 1972.

22
26a

6-152
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location Stonycreek Township, Somerset County, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 1 JWH

Time: 1:00 ☐ A.M. ☒ P.M. Date: January 24 1972 FRED DENNING-mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

A methane monitor, approved as reliable by the Secretary was not installed on the continuous miner in mains section

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
☒ There has been a violation of § 75.313 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 5 o'clock A.M. on FEBRUARY 24, 19 72.

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed Jerrold W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 466-065 Form 1

23
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6-152
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location Stonycreek Township, Somerset County, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 2 JWH

Time: 1:00 ☐ A.M. ☒ P.M. Date: January 24 1972 Fred Denning-mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

The face cutout used to protect the electrical wires leading from the junction box to the lift motor was not installed on the continuous miner.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
☒ There has been a violation of § 75.313 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☒ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 5 o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed Jerrold W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 466-065 Form 1

BEST COPY AVAILABLE

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28a

7202
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
Dana No. 1 MINE
Company Dana Mining Co.
Location [illegible]
I.D. No. 36-02480

☐ ORDER ☒ NOTICE No. 3 Jan 72

Time 1:00 ☐ A.M. ☒ P.M. Date January 24 1972 Fred Browning Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned 'duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

Telephone service was not provided from the surface to the underground working section

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 75.1600-2 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after

Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by ..... o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (e) (2) ☐
Notices 104 (b) ☐ 104 (c) (1) ☐

Signed [signature]
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 440-014 Form 1

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(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
Dana No. 1 MINE
Company Dana Mining Co.
Location [illegible]
I.D. No. 36-02480

☐ ORDER ☒ NOTICE No. 4 Jan 72

Time 1:00 ☐ A.M. ☒ P.M. Date January 24 1972 Fred Browning Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned 'duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

A self-rescue device approved by the Secretary was not made available for each underground workman.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 75.1714 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after

Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by ..... o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (e) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed [signature]
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 440-014 Form 1

26
30a

Form 1-1002
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA Mining INC.
Location STONYCREEK Township, SOMERSET County Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 1 J.W.H.

Time: 1:00 ☐ A.M. ☒ P.M. Date January 26 1972 Fred Dressing Mine Foreman.
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

the belt chain drive at the top of the storage bin was not guarded to prevent persons from coming in Contact with the chain drive.

[Cont'd Sheet no.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 77.400 of Part 77, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 8 o'clock A.M. on February 24 19 72

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (f) ☐

Signed Jessie W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 446-008 Form 1

27
31a

Form 1-1002
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location STONYCREEK Township, SOMERSET POINT, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 2 J.W.H.

Time: 1:00 ☐ A.M. ☒ P.M. Date JANUARY 26 1972 Fred Dressing Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

the opening around the belt drive and motor at the top of the storage bin was not covered to prevent persons from falling in the bin.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 77.2 (c) (4) of Part 77, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 8 o'clock A.M. on February 24 19 72

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (f) ☐

Signed Jessie W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 446-008 Form 1

FREDERICK R. BLACKWELL,
Washington, D.C., April 27, 1972.

Re: Delta Mining, Inc., Box 99, State Line, Pa.
Delta No. 1, Case No. 2312, Proposed
Assessment: $375. Issued, 4-11-72;
Received April 13, 1972.

MR. EVERETT TURNER,
Assessment Officer
U.S. Department of the Interior,
Bureau of Mines,
Washington, D.C. 20240

DEAR MR. TURNER: On behalf of Delta Mining, Inc., I hereby protest the above Proposed Assessment on the grounds that—

(1) The subject mine is a new mine having been opened in November of 1971, and, in consequence, the mine management personnel are confronted with the usual problems of the orientation of a new work force;

(2) The alleged violations covered by the assessment relate to matters having only minor significance in terms of safety; and

(3) The company is making a strong, good faith effort to achieve compliance with all health and safety standards; and

(4) The subject mine is a small mine producing approximately 8,000 tons of coal monthly; and

(5) The proposed penalties will have an adverse effect on the operator's ability to continue in business.

Sincerely,

FREDERICK R. BLACKWELL,
Attorney, Delta Mining, Inc.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., May 17, 1972.

ID: 36-03248-0

Re Mine: Delta No. 1, Case No: 2312. Proposed Order Affirmed (X): Amended Order Affirmed ( ).
Certified Mail, Return Receipt Requested.
DELTA MINING, INCORPORATED,
Box 99,
State Line, Pennsylvania 17213
Attention: Dwight L. Grove.

GENTLEMEN: Receipt is acknowledged of your letter of protest dated April 27, 1972 relevant to the Order of Assessment dated April 11, 1972. After review of all available information, including your letter of protest, the matter was given careful consideration, and the Order of Assessment is hereby affirmed. Please be advised that the abatement of a violation of the Federal Coal Mine Health and Safety Act of 1969 is not a defense relative to a proposed assessment. You may, within fifteen working days of receipt of this letter, request in writing a formal adjudication with an opportunity for a hearing to:

Assessment Officer
U.S. Bureau of Mines
Room 210
1725 K Street, N.W.
Washington, D.C. 20006

If we do not receive a request for adjudication within the aforementioned time, the matter will then become the Final Order of the Secretary. In replying, please refer to the case number.

Payment of the assessment should be made in the form of a check or money order made payable to the United States Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

EVERETT TURNER,
Assessment Officer.
FREDERICK B. BLACKWELL, *Attorney at Law.*

U. S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., June 26, 1972.

Re Mine: Delta No. 1. Case No.: 2312. Proposed Order (x): Amended Order ( ): Affirmed Order ( ). Certified mail, Return Receipt Requested.
DELTA MINING, INCORPORATED
Box 99
State Line, Pennsylvania 17213
Attention: Dwight L. Grove.

Gentlemen: No request for formal adjudication having been filed within fifteen (15) working days of your receipt of the above-captioned matter dated

April 11, 1972, you are hereby notified that the said Order has now been entered as the final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of $375.00 is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

EVERETT TURNER,
Assessment Officer.
FREDERICK B. BLACKWELL, *Attorney at Law.*

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., August 17, 1972.

Re Delta Mining, Incorporated, Operator.
Case No. 2312

I hereby find that the violations cited in the proposed order of assessment dated April 11, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein as final.

EVERETT TURNER,
Assessment Officer.

U.S. GOVERNMENT PRINTING OFFICE: 1970

Supreme Court, U. S.
FILED
MAY 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS
DELTA MINING, INC. and G.M.W. COAL COMPANY

FRED BLACKWELL
1707 H Street, N.W.
Washington, D.C. 20006
Attorney for Respondents,
Delta Mining, Inc.,
G.M.W. Coal Company.

May 13, 1975

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS

DELTA MINING, INC. and G.M.W. COAL COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 495 F.2d 38 and is printed in Pet. App. A, pp. 1a-16a. The opinion of the District Court is not reported, but is printed in Pet. App. D, pp. 21a-24a.

QUESTION PRESENTED

Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to prepare a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has failed to exercise his right to an administrative hearing, and even though the penalty can be enforced only in judicial proceedings where the operator is entitled to a trial *de novo* on all disputed issues of fact.

STATUTES AND REGULATIONS INVOLVED

1. Sections 109 (a) (1), 109 (a) (3), and 109 (a) (4) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756-757, 30 U.S.C. 819 (a) (1), 819 (a) (3), and 819 (a) (4), are printed in the Petition at pp. 3-5. Section 109 of the Coal Act is printed in full in the Addendum to this brief (Add., pp. 4-6).

2. 30 C.F.R. Part 100, as published on January 16, 1971 (36 Fed. Reg. 779-780), is printed in the Petition, App. E, pp. 25a-32a. These are the regulations which were in effect when the penalties in these cases were assessed, and which were invalidated by the Court of Appeals.

3. 30 C.F.R. Part 100.4 (h) is printed in the Addendum to this brief (Add., pp. 14-15) This regulation is part of the regulations referred to in 2 above and is the regulation under which the Secretary attempted to give finality status to the penalties in these cases.

STATEMENT IN CLARIFICATION OF FACTS

The Petitioner's brief provides a generally satisfactory statement of facts. However, on some important facts of the case, the brief reflects omissions and statements which are misleading. It is therefore necessary to make this statement of clarification in order to place the facts and issues of these cases in proper perspective.

1. The Petitioner asserts that the provision of the Federal Coal Mine Health and Safety Act of 1969 at issue in this case is Section 109 (a) (3), 30 U.S.C. 819 (a) (3). (Pet. Brief, p. 5) This is only partially correct, as both Sections 109 (a) (3) and 109 (a) (1) are involved in this case. We acknowledge that Section 109 (a) (3), and what is required of the Interior Secretary by its provisions, is the linchpin of this case; however, the six statutory criteria in Section 190 (a) (1) are also of critical import,[1] because the Secretary has to comply with these criteria in order to afford due process and in order to comply with the express requirements of Section 109 (a) (3) of the Coal Act. Thus, consideration of both of these sections is essential to the disposition of this case.

2. The Petitioner's Brief refers to the notices served on Delta as "typical" and then goes on to describe all of the safety standards alleged to have been violated by Delta. (Pet. b., pp. 6-7). None of these notices or descriptions was at any time a part of the record in the proceedings in the lower courts. Moreover, the Delta material is most certainly not typical in respect to the modest amounts of the penalties, nor was the newly-opened operation at

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[1] The six criteria in Section 109(a)(1) *must be* considered by the Secretary in determining the amount of the penalty.

Delta a typical working mine.[2] The Delta material is typical, however, in its showing that the Assessment Officer assessed penalties on the sole basis of the inspector's sparse, unsworn notes. But the GM&W material is even more typical because the withdrawal order for an accumulation of loose coal and the attendant penalty of $5,000.[3] in that case presents a prime example of the illegality of the Secretary's assessment procedures and of his actions thereunder. The Respondents, in this instance, submitted a protest to show that the condition cited in the order constituted neither an imminent danger nor a violation of a safety standard in that GM&W has an extremely wet floor from natural water inlets, which resulted in a sloppy accumulation of coal that was too wet to be combustible much less an imminent danger.[4] (Add., p. 32) The Respondents never received any explanation for the rejection of this good faith defense.[5]

3. The Petitioner's references to the minimum penalty schecule in the Appendix A Guidelines may leave the impression that this schedule is not in issue.[6] (Pet. b.,

[2] The advance work to open up the Delta mine had been underway for less than ninety days when the notices were issued in January of 1972. The coal being extracted was related to the opening of a new mine shaft rather than to the "typical" production of coal from a working mine.

[3] App. p. 87.

[4] An accumulation of loose coal ranging from "damp to wet" and alleged to be an imminent danger, has been held not violative of the Coal Act and not subject to penalty assessment. Decision of the Department of the Interior Board of Mine Operations Appeals in Bishop Coal Co., 4 IBMA 521.

[5] Of course, the assessors stated orally that the defense was unacceptable because they could not consider any facts which were at variance with the inspector's notes in the order.

[6] 30 CFR 100.2(b)(1971)(Pet. P., p. 32a) The "Guidelines for Assessment of Penalties" provided a schedule of minimum

[footnote continued]

pp. 8-9) This is not the case. Respondents, GMW & Delta, have contended from the outset that the schedule of minimum penalties self-evidently precludes consideration of the six statutory criteria which the Secretary must consider before determining the amount of a civil penalty.[7]

4. The Petitioner makes reference to Section 100.4(h) of Title 30, CFR, January 16, 1971, and states that thereunder "the orders become the final orders of the Secretary pursuant to the regulations, and thus subject to enforcement in the district court when they were not paid forthwith." (Pet. b., pp. 10-11). This statement takes for granted that Section 100.4 (h) contained authority for bringing the herein orders to finality. Such is not the case, and Respondents have argued from the outset, as we do in Point III of this brief, that the Petitioner contravened his own regulations by the methods used in this case to give the orders finality status.

5. The phase of this case involving Judge Gourley's ruling on the legality of the assessment procedures has no

penalties under a scheme which treated each violation as falling under one of four classes of violations. The minimum penalties were: $5,000-$10,000 for a violation involved in an imminent danger withdrawal order, $1,000-$5,000 for violations in other withdrawal orders; $100-$1,000 for serious violations; and $25-$500 for non-serious violations.

[7] The Petitioner has contended that the footnote to the minimum penalty schedule, which provides that a penalty may be higher or lower than the minimum penalties, permits consideration of the six criteria. This footnote argument is not persuasive; since the statute says that the criteria *must be considered*, such a schedule is *per se* violative of Section 109 (a) (1) of the Coal Act. Also, the Assessment Office personnel who handled the penalties in these cases, stated that internal policy prohibited their use of the footnote to assess a penalty in an amount lower than the minimum penalties in the schedule.

pertinence to the disposition of this case, as that ruling was not based on a considered judgement of Respondents' motion and challenge to the penalty assessment orders. Indeed, in a January 16, 1973 hearing on another matter, Judge Gourley denied Respondents' motion before it had been drafted and served. (App., pp. 23-24; Add., pp. 6-8)

SUMMARY OF ARGUMENT

The crux of this case is that the Respondents were denied their due process rights by the Interior Department Secretary's Part 100 penalty assessment regulations and by his actions thereunder in respect to the civil penalty orders in this case.

The Respondents specifically contend that the herein civil penalty assessment orders were issued without any prior determination that any alleged violation of a health or safety standard had in fact occurred, and without any bona fide consideration of the Section 109 (a) (1) criteria for determining the amount of the penalty. Such orders were authorized by and were in conformity with the Part 100 regulations in effect when this case arose, and accordingly, these regulations too are invalid. The orders are also invalid because, by omitting therefrom express findings of fact relating to the occurrence of violations and to the six criteria in Section 109 (a) (1) for determining the amount of the penalty, and thereby providing no finding of the occurrence of violations and no evidence or assurance of bona fide consideration of the six criteria, the Secretary failed to comply with the express requirements of Section 109 (a) (3) of the Coal Act.

In ruling favorably on the Respondents' contentions, the Court of Appeals held that ". . . the assessment orders

in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid." In reaching this conclusion, the Court considered and expressly rejected the Secretary's argument that Section 109 of the Coal Act does not require findings of fact where, as in this case, no administrative hearing is requested. The Court's ruling is consistent in all respects with the clear and unambiguous text of Section 109 of the Coal Act, and it should be affirmed.

The Respondents further contend that, for reasons separate and distinct from the foregoing, the herein orders are invalid because the findings of fact that violations actually occurred were not made until several months and longer after the orders were issued, and because the Secretary did not follow his own regulations in attempting to give the orders finality status. Finally, Respondents contend that this case is moot because the regulations at issue in the case have not been used by the Secretary since April 1973.

ARGUMENT

I.

THE PENALTIES HEREIN ARE INVALID. THEY DENY DUE PROCESS AND ARE BASED ON PRO FORMA CONCLUSIONARY FINDINGS OF FACT THAT DO NOT COMPLY WITH SECTION 109 OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969.

In the proceedings below the Secretary has argued: (1) that the civil penalty orders in issue did contain findings that specific violations did in fact occur and that the assessment prescribed in the order is appropriate in light of consideration of the six criteria set forth in Section

109 (a) (1) of the Act, and further, that ultimate facts or even implied findings satisfy the requirements of the Act because of the nature of the operator's rights in any action brought in a district court to enforce a civil penalty order;[8] (2) that the issue of whether a violation occurred is determined against the operator in the penalty order and such issue is *res judicata* in any district court enforcement proceeding; and (3) that the Respondents did not exhaust their administrative remedies in the proceedings before the Secretary and thereby waived their right to object to the validity of the orders in this action.

All of these arguments have been abandoned at various stages of the prior proceedings. The Secretary now limits his argument to the contention that merely because an administrative hearing was not requested in this case, he somehow became exempt from the requirements of Section 109 of the Act in respect to the statutorily expressed procedures for assessing a civil penalty under the Act. The Secretary's remaining argument is as unsound as the ones which have been abandoned, as our argument shall demonstrate.

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[8] Section 109(a)(4) authorizes the Secretary to bring a civil penalty enforcement action in any appropriate district court. The Section provides that: ". . . the Court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the Court shall determine the amount of the penalty to be imposed."

A. The Secretary Denied Due Process by Depriving Respondents of Important Substantive Rights Guaranteed by Sections 109 (a) (1) and (a) (3) of the Coal Act.

The Petitioner's Brief has cast the issue put to this Court in terms of whether, in a case in which the coal mine operator has not requested an administrative hearing, the Secretary of the Interior Department must comply with the Section 109 (a) (3) requirement that "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, . . ." The contention is then made that the Secretary does not have to issue a decision which incorporates findings of fact in such a case. The Respondents' discussion of the issue, as cast by the Secretary, is set out hereinafter in points B, C, and D of this brief; however, we must first point out that the real issue in this case is the denial of due process and that the specific reason for our challenge of the penalties in the first instance was because of the Secretary's denial of important substantive rights which should have been honored before the point in time at which the decision with findings was required to be rendered as part of the final penalty orders. Indeed, the Secretary's denial of the Respondents' substantive rights in this case is what led to the Secretary's failure to make the statutorily mandated decision with findings of fact because, understandably, once the Secretary had denied these substantive rights, he was simply not in a position to render a decision with findings which said that such rights had been honored.

The substantive rights to which we refer are the right to have a pre-assessment determination that a violation of

a standard did in fact occur (Section 109 (a) (3)), and the right to have a bona fide, pre-assessment consideration of the six criteria for determining the amount of the penalty (Section 109 (a) (1)). The six criteria are set out as follows in Section 109 (a) (1) of the Act;

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The Secretary's Assessment Officer, Mr. Everett Turner, was delegated the responsibility of honoring these substantive rights, in the course of carrying out the internal processes for the assessment of penalties; however, as the record in the district court shows, the conduct of these internal processes was characterized not only by little or no concern for administrative due process, but also by a total disregard for the substantive rights conferred upon mine operators by the express provisions of the Coal Act. This is evidenced by the admissions of Mr. Turner himself in deposition testimony which was taken in *National Independent Coal Operator's Association v. Morton*, 494 F.2d 987, 994 (D.C. Cir.), and which was, in part, entered in the record of this case.

The Turner testimony in the record of this case (App., pp. 92-98) shows that he routinely failed in at least five major ways to administer the assessment procedures properly and fairly:

(1) he accepted the statement of the coal mine inspector, contained in the inspector's notice of violation,

as the finding that a violation of a health or safety standard had occurred, and he made no independent finding that a violation did occur;

(2) he made no written record of such finding even for the agency's own record-keeping needs;

(3) he did not document or make any written findings to show what consideration, if any, had been given the six statutory criteria in Section 109 (a) (1) of the Act, 30 U.S.C.A. 819 (a) (1), for determining the amount of the penalty;

(4) he gave no written explanation to the operator when he decided to affirm, amend, or vacate a proposed assessment, and he made no written findings of fact regarding such actions; and

(5) he provided no method by which the operator could learn the basis of the actions of the Assessment Officer, except by travelling to the office of the Assessment Officer where he might be informed orally and informally of such basis.

With respect to the finding of the occurrence of a violation, the Turner testimony establishes that such finding was based solely on the allegation in a notice of violation and that there was no written finding that a violation had occurred. With respect to the consideration of the six criteria for determining the amount of the penalty, the testimony shows that Mr. Turner made no documentation, written findings, or notes in respect thereto, even for internal record-keeping. It therefore becomes self-evident that these criteria did not receive bona fide consideration. It is thus abundantly clear that the Respondent's substantive rights were denied in the internal handling of the assessment procedures. These

rights are secured both by the Coal Act and minimum standards of due process and their denial renders the penalty orders invalid.

Even if the denial of substantive rights were absent from this case, the former Part 100 assessment procedures would still be illegal. While the procedures amounted to a quasi-formal pleading system, requiring a substantial volume of written facts, explanations, reasons, and documentation on the part of the mine operator, the Secretary imposed upon himself no responsibility at all to provide any useful documentation of what happened on his part in the assessment of penalties. Moreover, the procedures were obviously and necessarily designed for exchange of the requisite materials in writing and through the mails. Yet Mr. Turner's testimony shows that there was no way under the procedures for the operator to know the facts and reasons for assessments, except by arranging a meeting with the Assessment Officer in which such facts and reasons might be given orally and informally.

The Assessment Officer's mishandling of the six criteria for determining the amount of the penalty was the subject of a highly critical report issued by the Comptroller General of the United States following a study of the functions of the Assessment Office in the Spring of 1972. (App., pp. 88-91)[9] Based upon analysis of a sample of 400 violations assessed by the Assessment Office from April through December 1971, the Comptroller General's Report concluded, *inter alia*, that the adequacy of the consideration of the six criteria could

[9] In follow-up Congressional hearings on this report, the subcommittee chairman characterized the former regulations as an "inexcusably sloppy method." Hearing before Subcom. of Com. on Gov. Operations, "Enforcement of Fed. Mine Health and Safety Laws," p. 542.

not be determined, primarily because there was no documentation to show how or whether the assessor considered the six criteria and because there were no written guidelines for the consideration of the criteria. The report also concluded, again because of the lack of guidelines, that the mine operators did not know how the six criteria should be considered in determining the amount of a penalty.

If the professional analysts in the Office of the Comptroller General could find no information on which to determine what consideration, if any, had been given to the six criteria, it follows with even more certainty that the mine operator had no information with which to make that determination. It also follows that, so long as such information is not available to the operator, he is deprived of his right to make an informed judgment on how he shall respond to the assessment action, and also is deprived of his right to make his own judgment on whether the six statutory criteria were properly considered.

The Court of Appeals, after finding that the herein penalties are invalid, took notice of the Comptroller General's Report in the following comment:

> ". . . we observe that the Bureau of Mines had not, at the time these assessments were made established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines led the Comptroller General, in a report on the Bureau of Mines, to state that:
>
> > 'We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in (400) sample cases.'
>
> * * *

> '. . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty.'
>
> "Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount."

The statement of the Court of Appeals is sound. The herein penalties were issued under laws which secure to the Respondents the substantive right to have the six statutory criteria properly considered and the right to have a proper finding of fact in respect to the occurrence of a violation. Both of these rights were denied by the Secretary's former Part 100 regulations and by his actions thereunder, and therefore, the Court of Appeals correctly found the penalties to be invalid.

B. Section 109 (a) (3) of the Coal Act Required the Secretary of the Interior Department to Render a Decision incorporating Findings of Fact in These Cases.

Section 109 (a) (3) of the Coal Act provides that a civil penalty shall be assessed ". . . only after . . . the Secretary has determined by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." This language is plain and clear on its face, insofar as it requires findings of fact before the Secretary can issue a final order of assessment and no distinction is made between assessments in

hearing and non-hearing situations.[10] The Secretary himself at various times has subscribed to this construction and understanding of Section 109 (a) (3).

When the Secretary initially implemented the Coal Mine Health and Safety Act in March of 1970, he published regulations which provided for civil penalty assessments to be determined by a hearing examiner, with a right of appeal to a Departmental appeals board.[11] If the Secretary had adhered to this procedure of making assessments by a juridical officer, or if he had instituted his present regulations from the outset, there would be no basis for the present litigation.

However, some nine months after publication of these first regulations, the Secretary adopted the Part 100 procedures which eliminated the rule that required a hearing examiner to perform the initial assessment function. Instead, the assessment function was transferred to an Assessment Officer who issued the assessment orders at issue in this case. Such orders, as the Secretary now concedes, did not comply with the express provision of Section 109 (a) (3) which authorizes the assessment of a penalty only after the Secretary has rendered a decision with findings of fact.[12] The

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[10] "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inferences in every direction." *Ex Parte Collette*, 337 U.S. 55.

[11] Title 30 C.F.R. Part 301, published March 25, 1970; Federal Register, Vol. 35, pp. 5255-5258. These regulations were subsequently recodified as 43 C.F.R. Part 4, section 4.540 et seq.

[12] The orders were issued on pre-printed forms bearing the facsimile signature of the Assessment Officer and having blank spaces for the name and address of the coal operator, the name of the mine, the date of the order, the list of alleged violations, and the amount of the penalty. In rejecting the Secretary's contention

[footnote continued]

Secretary contends that such orders are, nonetheless, valid because he is exempt from the civil penalty assessment provisions in Section 109 (a) (3) where, as in this case, an administrative hearing has not been requested.

The Secretary's claim of exemption relates to the first sentence of the three-sentence text of Section 109 (a) (3):

> "(3) *A civil penalty shall be assessed* by the Secretary *only after* the person charged with a violation under this Act has been given an opportunity for a public hearing and *the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted*, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. (Emphasis provided)"

It is difficult to perceive how one could possibly read the clear and straightforward language of the foregoing first sentence as being addressed solely to the situation where the hearing right has been exercised. The use of the conjunctive "and" in the text has joined together as a single unit the phrase involving the hearing opportunity with the phrase involving the Secretary's decision with findings of fact. Indeed, one could scarcely find a more

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that the orders contained adequate findings of fact, the Court of Appeals cited Environmental Defense Fund, Inc., v. Ruckleshaus, 439 F.2d 584, 596 (D.C. Cir. 1971), K.C. Davis Discretionary Justice, ch. VI (1969), et al.

ordinary and natural conjunction of phrases. The text thus expresses a unity of procedural steps which applies to the assessment of any civil penalty, either in a hearing or in a non-hearing situation, and any construction to the contrary would amount to rewriting the text of the statute.[13]

Self-evidently, the text of Section 109 (a) (3) gives the person charged two distinctly different rights: (1) the right of an administrative hearing, and (2) the right to have the Secretary abide by the specified procedures when a civil penalty is assessed. The statute says not one word about these rights being in tandem, or that the second right is some sort of inchoate right which does not become fully vested unless the first right is invoked.

The first right does not depend upon whether the person charged has in fact violated a health or safety standard. It comes into existence when an allegation of violation is made. The second right, in contrast, does not even come into play until the person charged is found to have violated a standard, but when this happens, the six statutory criteria in Section 109 (a) (1) for determining the amount of the penalty also come into the picture. At this juncture the considerations being determined are too numerous and too important to assume that the Congress intended for them to be made without a reasonable explanation of their basis to the person being assessed. Clearly, the Congress intended to say just what it did say in spel'ing out the assessment requirements in Section 109 (a) (3), and the text provides not even a hint that any exception to these requirements was contemplated.

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[13] See footnote 20 in the decision of the Court of Appeals which noted that words in statutes ordinarily should be accorded their most common, everyday meaning. McBoyle v. United States, 278 U.S. 41, 48 (1928).

The Secretary's argument to the contrary carries no logic. For example, if the Secretary is correct in asserting that the first sentence in Section 109 (a) (3) is limited to the situation in which the operator has exercised his right to have a hearing, the statutory text is then left barren of any enabling language that empowers the Secretary to assess civil penalties in a nonhearing situation. The provisions in Section 109 (a) (1), which empower the Secretary to assess a civil penalty, also prescribe that such penalty "shall be assessed by the Secretary under paragraph (3)" of section 109. Hence, if the text in paragraph (3) applies only to a hearing situation, the Secretary is then left without any express statutory power to assess a civil penalty in a non-hearing situation, because the first sentence in paragraph (a) (1) and the first sentence in paragraph (a) (3) of Section 109 are the sole source of penalty assessment authority to be found in the entire Act. This result, though obviously an absurb and unacceptable one, is exactly where we are lead by the Secretary's argument concerning Section 109 (a) (3).

One of the most fatal defects in the Secretary's contention is revealed by his own argument to the effect that both the first and third sentences of section 109 (a) (3) relate exclusively to the situation where a hearing is held. The third sentence makes any penalty hearing subject to Section 5 of the Administrative Procedure Act,[14] which by incorporating Section 8 of the APA,[15] requires that the final decision of the Secretary in such hearing shall be accompanied by findings. As noted by the Court of Appeals, "this tends to indicate that findings are required when a violator does not seek a hearing as

[14] 5 U.S.C. Section 554.

[15] 5 U.S.C. Section 557.

well as when he does . . . Thus the language in Section 109 itself requiring findings [the first sentence of Section 109 (a) (3)] would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held." In a torturous attempt to dispel the force of this point, the Secretary states that the Congress wanted to make several procedural requirements applicable to a penalty hearing, including the requirements for findings of fact, and that, in order to accommodate this aim, the Congress had to refer to Section 5 of the APA since it otherwise would not have applied. If this premise is valid, then the conclusion of the court below is reinforced because the premise strongly suggests that the reference to a decision with findings of fact in the first sentence of Section 109 (a) (3) applies *only* to a non-hearing situation. Sensing that this unacceptable construction is where the argument leads, and that he must explain the use of "decision incorporating . . . findings of fact" in the first sentence, the Secretary speculates that "Congress could have thought that if it simply referred to Section 5 of the APA without more, findings of fact *after a hearing might not be required*." (Pet. b., p. 21) This is farcical, palpably so. The Congress may have some deficiencies, but a deficiency of legal counsel to advise on the content of an Act (APA) that has been in effect for almost three decades is not among them.[16] On its face, the first sentence of Section 109 (a) (3) governs the assessment of any penalty assessed under the Act and speculation about what the Congress might have thought, or that the sentence might have been written differently, will not alter this fact.

[16] The APA has been law since June 11, 1946.

When the Court of Appeals considered this case below, the court was fully cognizant of the decision in *NICOA v. Morton, supra*, p. 9, wherein the Court of Appeals for the District of Columbia had concurred with the Secretary's argument about the construction of Section 109 (a) (3). Thus the court below not only considered in depth all facets of the Secretary's entire argument about Section 109 (a) (3) (wording of statute, legislative history, etc.), but also had the benefit of its sister court's reasons for concurring with the Secretary's argument. The court below rejected the Secretary's argument, as well as the NICOA decision, and concurred with the Respondents' position that, whether or not the operator requests a hearing, the language of Section 109 (a) (3) requires that a penalty assessment must be made by the Secretary's "decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." The court stated:

> "The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such findings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid."

The Court also noted that the requirement of findings of fact might well have a salutary effect on the administration of the Act's civil penalty provisions:

> "Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not worsen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders

> entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings."

As we have previously noted, the Secretary's first civil penalty assessment regulations contained provisions which complied with the assessment requirements of Section 109 of the Coal Act and which provided substantial protection of a coal operator's rights to administrative due process. These first regulations were published on March 25, 1970 under faulty publication procedures and then republished properly on November 18, 1970. Then, about two months later, the Part 100 regulations at issue in this case were published on January 16, 1971. This historical note points up that in the early administration of the Coal Act, the Interior Department's assessment regulations openly acknowledged that a civil penalty was required to be assessed in accordance with the express requirements of the Coal Act. The former Part 100 regulations no doubt served the administrative convenience of the agency administering the Coal Act, but they have worked to deprive these Respondents of substantive rights secured by the Coal Act, as well as of administrative due process rights. It is

axiomatic, however, that the jurisdiction and power of an administrative agency depends entirely upon the terms of the statute reposing power in it. The agency cannot confer power upon itself or alter the terms of its governing statute, and the agency must meet and comply with the conditions and provisions of the statute. Although these tenets were cast aside in favor of administrative convenience under the former Part 100 regulations, they have been revived by the Court of Appeals' ruling which invalidated the Part 100 regulations. There the matter should rest.

C. There is no Legislative History to Support the Proposition that the Section 109 (a) (3) Decision with Findings of Fact are Required Only in a Hearing Situation.

The Secretary concedes, as he must, that his point A argument does not satisfactorily establish the soundness of his construction of Section 109 (a) (3), and that he must look to the legislative history of the section to shore up his argument. (Pet. B., p. 24)

We shall have no difficulty in showing that the legislative history offers no succor to the Secretary's argument. Preliminarily, though, we assert that the discussion of legislative history does not even belong in this case because, as is so well settled as to require no citation of authorities, the courts resort to legislative history of a statute only when the statutory text is in some way ambiguous, unclear, or in conflict with another provision of the statute or with another statute. None of these elements exist here as was noted by the court below.[17]

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[17] ". . . There is no need to refer to the legislative history where the statutory language is clear . . ." *Ex Parte Collette, supra*, p. 15.

[footnote continued]

The threshhold defect in the legislative history presented by the Secretary is that it is counterfeit. The central basis of the Secretary's construction of the history of Section 109 (a) (3) is a passage from the narrative part of the Conference Report on the bill which became the Coal Act. This passage, in the Secretary's discussion of the legislative history, is treated as an expression about the content of the final bill by both the Senate and House members of the Conference Committee.[18] (Pet. b., p. 26) This is not correct. The narrative part of the Conference Report which is entitled "Statement of Managers On The Part Of The House," and which is the source of the extracted passage, was signed by the House members only. [19] It was never agreed to or signed by the Senate members of the Conference Committee. The text of the statutory language accepted by the House-Senate Conferees is the only part of the Conference Report on the coal mine legislation which was agreed to and signed by both the House and Senate members of the Conference Committee.[20] Indeed, when the coal bill was considered in 1969, the authorship of the narrative

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Footnote 15 in the decision below stated that: "Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. See Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947)."

[18] The *NICOA* decision also treats this passage as a consensus statement by both Senate and House members of the Conference Committee. (Pet. Writ, App. G, p. 71a)

[19] See Add., p. 27 for signature page in Conference Report which evidences that only House Conferees signed the "Statement of Managers." Also, Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, p. 1057.

[20] See Add., pp. 26-27 for signatures following text of bill.

statement in a Conference Report was a carefully guarded, unilateral right of the House Conferees. This did not change until the enactment of the Legislative Reorganization Act of 1970, which provided for the Conference Report to contain a statement ". . . prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate." [21]

It is therefore obvious that the source material on which the Secretary's legislative history is based, fails to reflect a House-Senate consensus on the legislative intent of Section 109 (a) (3) and thus the legislative history is inconclusive with respect to such intent. The text of the section must therefore be interpreted and applied as written.

Aside from the foregoing, the Secretary's construction of the legislative history is not supported by the record of the Congressional proceedings on the Coal Act. The Secretary's construction of the history starts with the premise that a decision with findings of fact would have been necessary only in a hearing situation if either one of the coal mine bills before the Congress, H.R. 13950 or S. 2917,[22] had been enacted into law, and consequently, Section 109 (a) (3) in its present form applies only to a hearing situation. The premise of this construction is fallacious and the Secretary has not produced a single item of tangible evidence to support these inferences. Indeed, the evidence in the House and Senate Committee Reports on the Coal mine bill—the most informative

[21] Add., pp. 21-33, extract from P.L. 91-510, Oct. 26, 1970, 2 U.S.C. 190C. See Add., p. 24 for pertinent extracts from Senate Committee Report leading to Act, and Add., p. 28 for an example of a Conference Report after 1970.

[22] The pertinent penalty provisions in the two bills are set out in the Pet. b., pp. 24-25.

documents involved in the legislative history of the text in question—is very much to the contrary.

The Committee Report on the House bill, in speaking about the penalty provisions of H.R. 13950, stated as follows:

> "Any penalty assessed under this section is, upon request, subject to review by the Board. The Secretary may initiate the collection of any penalty by civil action in the appropriate district court of the United States." [23]

In sharp contrast the Senate Committee Report on the Senate bill S. 2917 stated that:

> "An order assessing the penalty *would be issued after a hearing and decision on whether or not the penalty is warranted and on the amount of the penalty. The hearing and decision would be subject to 5 U.S.C. 554.*" [24] (Emphasis provided)

The above passage from the House Report confirms that the House bill permitted a penalty assessment without a hearing, and that the hearing right would have to be expressly requested. However, the House assessment provision was rejected in Conference. Furthermore, when the passage from the House Report is read in conjunction with the italicized passage in the Senate Report, it becomes abundantly clear that instead of having the common characteristic of excepting a decision with findings of fact in a non-hearing situation, the bills were in fact poles apart in their penalty assessment procedures. Consequently, while the Secre-

[23] H. Rep. 91-563, 91st Cong., 1st Sess., Legislative History of Federal Coal Mine Health and Safety Act, by the House Committee on Education and Labor, p. 569.

[24] S. Rep. 91-411, 91st Cong., 1st Sess., Ibid p. 93.

tary's premise is correct in respect to the House bill, the premise has no validity at all in respect to the Senate bill because the Senate Report made it clear that the Senate bill conceived of assessing penalties only in a hearing context and that non-hearing penalties were not even contemplated.[23]

The Senate text was adopted by the Conference Committee with minor changes and no change at all in the requirement in dispute in this case. The requirement that a civil penalty shall be assessed ". . . only after . . . the Secretary has determined by decision incorporating findings of fact" was in the Senate bill prior to the conference and it remained unchanged in the final bill which was agreed to by the Conference Committee, and which was signed into law by the President on December 30, 1969. If the result urged by the Secretary had indeed been within the contemplation of the Congress, this would have been a matter of major import in a statute imposing sanctions as severe as those in the Coal Act and would have without question warranted a clear explanation in the record. However, since the slight change made in the Conference did not affect or even touch upon the requirements for a decision with findings of fact in the Senate bill, the House Manager's Statement in the Conference Report was silent on the reasons for the change, as was the record elsewhere in the legislative proceedings on the bill. [26]

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[25] The serious concern in the Senate that operators be afforded full procedural due process under the penalty provisions is reflected in the discussion of such provisions on the Senate floor. See Legislative History, pp. 462-63; pp. 509-510.

[26] The sole effect of the Conferee's change in the language of the Senate bill was to permit a penalty to be assessed without an administrative hearing in every case.

The Court of Appeals considered the legislative history, as construed by the Secretary, and concluded that it failed to support any deviation from the express requirements of the Act. The court stated:

> "Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested."

D. It is Unsound to Release the Secretary From the Requirement to Render a Decision With Findings of Fact, Because This Would Shift the Administrative Responsibility From the Secretary to the Courts.

The Secretary's ultimate objective, as revealed in the argument in Points C and D of Petitioner's Brief, is to escape from the trouble and work entailed in the reassessment of the penalties which were invalidly assessed under the former Part 100 regulations. The Secretary's original claims about the dimensions of the reassessment work put the cases at 2,400 and the number of violations at 24,000.[27] However, following the Respondents challenge of these claims,[28] the Secretary's auditors took another look at the situation and reduced the count to 2,050 cases and to 18,350 violations.[29] This reduction of 350 cases and 5,650 violations amounts to a

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[27] Petition for Writ, p. 13.

[28] Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 4-5.

[29] Reply Memorandum for Petitioner, App., p. 1.

23% smaller work load of violations than the Secretary originally claimed,[30] but the Secretary contends that even the reduced number of cases would require 300 man weeks to reassess.

Underlying the entire argument about the administrative burden is the blithe assumption that what is hard for the Secretary to do administratively becomes easy to do merely by shifting the work to the district courts. This is unrealistic. The work involved in purging the defects from the 2,050 outstanding cases is there to be done and, if the cases were shifted to the district courts, the work would still be there to be done. Indeed the physical dimensions of the task could well be vastly greater in court actions than if performed administratively. For example, in this very case, the attorneys of the Secretary estimated that their part of the trial time in the GMW case at a week and a half to two weeks and in the Delta case at two and a half days. (App., p. 42) If we apply the attorneys' estimate of a total of about twelve and a half days of trial time to the Secretary's calculation of the number of cases, the trial time involved in the 2,050 cases would be in excess of 2,000 man weeks for a single government attorney. We are speaking about federal manpower in either instance, whether the task is performed in the Secretary's department or in the district courts, so, obviously, the Secretary's doing the task with 300 man weeks of federal manpower is much the better option.

We recognize, though, that our projections of needed resources, as well as those of the Secretary, are inconclusive and we therefore submit that the actual experience under the present regulations affords a better

[30] The reduction in violations is 23.54%; in cases 14.58%.

base of information by which to measure the reassessment task if it is done administratively.

In 1974, the Interior Department's Office of Hearings and Appeals docketed 12,539 penalty cases. Of that total, the cases not involving an administrative hearing and disposed of by an Administrative Law Judge (ALJ), numbered only 382.

The 12,539 cases were docketed under the present procedures by reason of Section 100.6 (a) of Title 30 which requires that all violations not disposed of in conference must be forwarded to the Associate Solicitor for the filing of a petition to assess a civil penalty pursuant to 43 C.F.R. 4.540.[31] Since both hearing and non-hearing situations must be referred to an ALJ for disposition under these regulations, it would appear that the 382 non-hearing penalty cases in 1974, slightly over 3% of the total cases docketed, provide a valid indicator of the manageable nature of the work involved in reassessing the 2,050 outstanding penalty cases involving 18,350 violations.[32]

But even if the burden of reassessment were in fact an arduous one, this would not serve to validate the invalid Part 100 penalty orders. Nor would it justify the dumping of the Secretary's assessment work onto the district courts, for this would go against the grain of this

[31] Add., pp. 19-21. These regulations involve a procedure similar to the one under attack in this case in that Section 100.4(c) permits the Assessment Officer's order to become a "final order" if the operator does not request a hearing. However, the procedure is inoperative if a conference is requested by the operator because, under another provision in the same section, such a request renders Section 100.6(a) applicable.

[32] The 382 cases were handled promptly by the Administrative Law Judges, and no backlog occurred. Information received from the Office of Hearings and Appeals on April 1, 1975.

government's long accepted concept of assigning functional responsibility to an administrative agency with the courts being granted the power to assure that such function is properly performed. The Congress clearly intended for the Secretary to administer the civil penalty provisions of the Coal Act up to the point of the issuance of a valid, final order. The mere fact that such responsibility may now involve an arduous task because of the Secretary's own actions is no reason why he should be released from this statutory obligation.

The arduous task argument is thus unsound, as are the other reasons offered by the Secretary to justify the use of the district courts to launder the defective penalty orders. For example, the facts of this case forcibly refute the contention that "the Secretary need not prepare a formal decision *where there is no dispute and the operator evidences his satisfaction with the proposed penalty* by choosing not to request a hearing." (Pet. B., p. 35) (Italics ours) This statement, along with a similar statement in the *NICOA* decision, supra p. 10, falls into error through a gross misconstruction of the facts. In all cases where the operator has filed a protest to a proposed or amended assessment order, the last word which the Assessment Officer hears from the operator is contained in a written protest which can only be read as evidencing dissatisfaction with the proposed penalty cases and disputing its basis. This is doubly true in this case because, following receipt of the penalty orders, Respondents wrote to the Assessment Officer stating that:

> "This is to advise you that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of the penalties before the U.S. District Court.

> "We have expended a great deal of time and gone to considerable expense to present to your office facts and circumstances bearing on the six statutory criteria, and in no instance has your office shown any disposition to give any considerations to the merits of our position on any of the matters that we have presented. Your office has admitted that it has no discretion to deviate from the published minimum penalty schedule, despite the footnote reference which authorizes lesser penalties and no authority to vacate a citation even if shown to be erroneous."

This unequivocal challenge of the penalties refutes any claim that the Respondents accepted the penalties without dispute. But, as previously noted, even if this challenge had not been made, the Respondent's prior protest under the procedures disputed the penalties and any argument to the contrary reflects an erroneous construction of the facts.

The Secretary falls into further error in the suggestion of an interrelationship between Sections 109 (a) (3) and (a) (4) of the Coal Act, The assessment procedure, including opportunity for an administrative hearing and decision with findings, is provided by Section 109 (a) (3) and the opportunity for *de novo* review in district court, including a jury trial on certain issues when requested, is provided by Section 109 (a) (4). These are two entirely different and unrelated sets of rights which the Act has conferred upon the operator. The right of a hearing before the agency and the right of a hearing in court have no significance to one another. The operator is free to exercise his rights to have either or both of the hearing proceedings, or to have neither proceeding. Whatever he does, no procedural or substantive advantage results to the Secretary because the Secretary has not given up

anything or otherwise been prejudiced by the operator's exercise or non-exercise of his rights under the Act. And, although a *de novo* trial may serve to cure some of the ordinary and occasional defects in administrative proceedings, this by no means implies that a *de novo* trial can serve that purpose in the situation which obtains in this case. Here, major defects have invalidated each and every order involved in the same identical way and, moreover, such defects have occurred on a massive scale. Furthermore, no weight or relevance can be given to the Secretary's statement that leniency had been granted under the minimum penalty schedule, by the imposition of penalties at the lower limits of the schedule, and hence the Respondents had no need for information on how the penalties were arrived at. (Pet. b., p. 35)[33] Since the minimum penalty schedule necessarily precluded consideration of the six statutory criteria in Section 109 (a) (1), its use by the Assessment Officer was merely another illegal incident in the gamut of illegal assessment actions. And finally, the Secretary's suggestion that the operator's sole interest in the decision with findings of fact is to prepare for court litigation is simply not true. The Operator's main interest in the decision with findings is to have information which tells him in a meaningful way the basis of the decision that he has violated a standard, when such is the fact, and that the statutory criteria for determining the amount of the penalty have been properly applied to his case. As was discerned by the Court of Appeals, where such information is forthcoming, penalties may generally be resolved on the basis of the orders without either party having the expense of an administrative

[33] The minimum penalty schedule is called "Appendix A Guidelines". Pet. for Writ., App. E, p. 32a.

hearing or a court action.[34] This is certainly true in respect to these Respondents and we are confident that it is true in respect to the majority of the operators involved in penalty cases under the Coal Act.[35]

Throughout this entire proceeding, beginning with Respondents' dealings with the Assessment Office and continuing into the court action, the Secretary's approach to these matters has been based on the notion that he is just another private party in an adversary proceeding and that he, like a private party, can somehow gain an advantage from the actions or inactions of the other litigant. This should not be so. The Secretary is the head of a powerful agency of a powerful government. Such enormous power implies an obligation on his part to exercise restraint and self-discipline against misuse and abuse of his powers. Such enormous power further implies that the Secretary is charged to comport himself in strict accord with the letter of the law. Indeed, his conduct should be exemplary. What an operator does nor does not do with his rights under the Coal Act, does not lower or remove the Secretary's obligation to carry out his duties under the Act properly; the Court of Appeals correctly directed the Secretary to honor his obligation and that directive should stand.

[34] Supra, p. 20. As stated by the Court of Appeals: "Where the proposed orders . . . and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings.

[35] 11,000 penalty cases were docketed in the Office of Hearings and Appeals on July 1, 1974, as compared to 8,000 cases docketed on March 31, 1975. This decline of 3,000 cases evidences a definite trend toward resolution of penalties without an administrative hearing.

II.

THE HEREIN PENALTIES ARE INVALID, BECAUSE THEY WERE ASSESSED LONG BEFORE ANY FINDINGS OF FACT WERE MADE THAT THE ALLEGED VIOLATIONS FOR WHICH PENALTIES WERE ASSESSED HAD IN FACT OCCURRED.

Section 109 (a) (3) of the Coal Act, and the failure of the Secretary to comply therewith, was a major subject of our preceding argument in Point I. On the issue argued here, we shall show that Section 109 (a) (3) was also violated because the findings of fact that violations actually occurred were not made until several months and longer after the penalty orders were issued.

As shown on the face of the exhibits annexed to the Complaints filed in the District Court, the Orders of Assessments were issued on dates as follows: The single order in the Delta case was issued on April 11, 1972 (App. 9); the three orders in the GM&W case were issued on December 27, 1971 (App. 61), January 24, 1972 (App. 64), and May 31, 1972 (App. 58). (These orders are hereafter respectively referred to as Order Nos. 1, 2, 3, and 4.) Also as shown on the face of these exhibits, none of these orders contained any findings of fact that the violations of health and safety standards for which penalties were assessed had in fact occurred, and thus, on the date of their issuance, not a single one of the four penalty assessment orders was supported by a finding that GM&W and Delta had in fact violated any of the standards for which they were assessed penalties.

The Secretary apparently became aware of this fatal legal defect in the assessment orders when court enforcement was contemplated, because, belatedly, under date of August 17, 1972—only about two months before the filing of these actions—the Secretary's Assessment

Officer, Mr. Everett Turner, issued findings that the violations covered by each of the four orders did in fact occur. These findings were issued on pre-printed forms bearing Mr. Turner's facsimile signature and having blank spaces for the name of the operator, the case number, and the date to be typed in. (App. 8, 60, 63, and 57)

The August 17, 1972 date on these findings of fact shows that the Secretary and/or his Assessment Officer totally defaulted in their duty under the Act to make such findings before assessing penalties. Furthermore, in attempting to cover up their indifference to the statutory mandate, they issued findings which came so long after the assessments were issued that under no stretch of the imagination could their act be regarded as excusable error. The August 17, 1972 findings of fact were issued *almost four months after* Order No. 1, *almost one year and eight months after* Order No. 2, *almost seven months after* Order No. 3, and *almost four months after* Order No. 4.

Moreover, even though the Secretary's Assessment Officer made these findings of fact about two months prior to the filing of this action, the findings were not served even at this late date upon the Respondents. Consequently, the Respondents had no knowledge at all of the findings of fact until their receipt as exhibits attached to the Complaints.

Section 109 (a) (3) of the Coal Act clearly requires that "findings of fact . . . that a violation did occur" shall be made before assessment of a penalty. Then, and only then, is the Secretary authorized to assess a civil penalty. But it is crystal clear that the Secretary did not make such findings before assessing the penalties in this case. Furthermore, after defaulting in the duty to make such pre-assessment findings, the Assessment Officer took

action to cure this default by making post-assessment findings of fact. This action does not cure or obscure the invalidity of the assessment orders, however. It only shows again a disregard for administrative due process and the procedural requirements of the Coal Act. Consequently, and irrespective of how it came about, the penalty assessment orders in this action were issued without any findings of fact that the Respondents had in fact violated any health or safety standard under the Coal Act. The assessment orders are therefore invalid and not enforceable.

III.

THE SECRETARY AND/OR HIS AGENTS FAILED TO COMPLY WITH HIS OWN REGULATIONS IN DECLARING THE HEREIN PENALTY ASSESSMENTS TO BE THE FINAL ORDERS OF THE SECRETARY.

When the assessment orders were issued in this case, the Respondents neither accepted the orders nor requested a hearing. The situation involving neither acceptance of an order nor a hearing request was not covered by the regulation under which an order was brought to finality during the period in question and consequently, the orders in this case are not final orders under the applicable regulations.

Under Section 100.4 of the assessment regulations published on January 17, 1971, Mr. Everett Turner, the Secretary's Assessment Officer was given the authority, after review of each notice of violation or order of withdrawal, "to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be imposed." (Add., pp. 13-15) The steps which Mr. Turner was required to administer, as specified by the regulations and as pertinent to the finality question at issue, are as follows:

(1) The Assessment Officer shall serve by certified mail a Proposed Order of Assessment upon the operator or miner charged. (Section 100.4 (b), Add. p. 13)

(2) The Proposed Order of Assessment shall advise the operator or miner charged that he has 15 working days after receipt of such order to protest the proposed assessment. (Section 100.4 (d), Add., p. 14)

(3) When an operator files a protest the Assessment Officer may reconsider the proposed assessment and may amend or reissue the Proposed Order of Assessment (Section 100.4 (g), Add., p. 14)

(4) The next step-the one at issue here-is contained in Section 100.4 (h) which provides that the operator or miner has 15 working days within which to accept the amended or reissued order, "*whereupon* it shall become the final assessment order of the Secretary," *or* to request formal adjudication with opportunity for a hearing. (Emphasis provided) (Add., pp. 14-15)

Mr. Turner complied with steps (1) and (2) and Respondents complied with step (3). This brings us to step (4), and to Section 100.4 (h) which, on the dates of these penalties assessments, did not contain any provision about what happens if the person charged does not accept the amended or reissued order and does not request a hearing. These Respondents neither accepted the orders nor requested a hearing, but instead stated in writing "that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of these penalties before the U.S. District Court." (Add., pp. 1-3)

At this point the Assessment Officer's authority under Section 100.4 (h) was exhausted, but he nonetheless transmitted another letter declaring that, since no hearing

had been requested, each order had been "entered as the final Order of the Secretary."

The proof that the Assessment Officer had no authority to take this action can be easily derived by a comparative reading of the text of Section 100.4 (h), as published on January 16, 1971, with the text of a corrective amendment adopted as 100.3 (h) on June 15, 1972, to provide the previously omitted finality authority:

> "100.4 (h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to *accept* the amended or reissued order, *whereupon* it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." (Add., pp. 14-15)
>
> "100.3 (h) The operator or miner charged shall have 20 days from the receipt of an amended or reissued proposed order to accept the proposed order, or to reject such proposed order in whole or in part and petition for hearing and formal adjudication. *Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary*." (Add., p. 16) (Emphasis provided in each quotation)

Whatever prospective legal effect this belated provision of authority in Section 100.3 (h) might have, it could in no way legitimize a previous unauthorized action of the Assessment Officer. All of the orders in these cases were issued prior to the corrective amendment of June 15, 1972, and consequently, the Assessment Officer's attempt to give them finality was in contravention of the long settled principle that an administrative agency may not ignore its own regulations and is bound by its own procedures.

One of the leading cases involving this principle is *Accardi v. Shaughnessy*, 347 U.S. 260, in which the Appellant challenged a denial of suspension deportation order under Section 19 (c) of the Immigration Act of 1917. The Appellant challenged the action of the Attorney General who, just prior to the consideration of the suspension request by the Board of Immigration Appeals, circulated a confidential list of "unsavory characters", including Appellant, whom he wished deported. Regulations under Section 19 (c) required the board, whose members were appointed by the Attorney General, to exercise its discretion and its decision was final except for such cases as by regulation it referred to the Attorney General. In reversing the denial of suspension, the Supreme Court said:

> "In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."[36]

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[36] See also *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535.

In unequivocal terms, in this case as well, the regulations provided for finality only in the event the operator chose "to accept" the order and where, as here, the operator neither accepted the order nor requested a hearing, the Assessment Officer had no right to sidestep the regulations or to dictate his decision that the orders were the final orders of the Secretary. The authorities make it clear that the Assessment Officer's effort to usurp the finality authority must be deemed a nullity, and in consequence, the orders involved in his actions are likewise a nullity and unenforceable as final orders under the Act.[37]

IV.

THE CASE IS MOOT.

We have argued in our brief in opposition to the Writ that this case is moot because the regulations under which these penalties were assessed were replaced by a new set of civil penalty assessment regulations in April 1973. We shall not repeat that argument here, except to note that the bar from mootness arises under Article III of the Constitution of the United States of America. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 and *Natural Milk Producers' Assn. of California v. San Francisco*, 317 U.S. 423, rehearing denied, 318 U.S.

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[37] Interestingly enough, the Interior Department's view of the nature of a proposed final order issued by the Assessment Officer seems to depend somewhat on the objective of the moment. For example, the Secretary's Associate Solicitor has stated that such an order is "simply in the nature of an offer of compromise. The operator is free to accept or reject the Order." (Add., p. 31) If we take this statement at face value, it seems self-evident that these offers of compromise cannot be converted into final orders by the unilateral action of the Assessment Officer.

798.[38] However, implicit in the Secretary's position in the case is the representation that he does not intend to reinstitute the former Part 100 regulations if he prevails in this case and that he will continue to use the new regulations in the present and future assessment of penalties. It is thus apparent that the Secretary's sole interest in the former regulations concerns his desire to be rid of what he regards as the troublesome burden entailed in the reassessment of the penalties invalidly assessed prior to April 1973. It is therefore in order to call attention to some of the questions raised by the data which the Secretary has offered to demonstrate the arduous nature of this reassessment work.

One of the points involved in these data is that 300 man weeks would be needed to reassess the 18,350 violations involved in the invalid penalties.[39] Another point is that, presently, the Assessment Office has a work force of 15 assessors.[40] The third point is that 80,000 notices of violations are issued each year.[41]

These data do not reconcile with one another. If we take them at face value, they demonstrate that the Assessment Office does not have sufficient staff to perform the assessment work arising under the present regulations and, if this is so, the Secretary's so-called administrative burden has been caused by his own failure to obtain, train, and allocate manpower properly.

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[38] In Natural Milk the complained of ordinance was nullified by the milk commission after the trial of the case.

[39] Reply Memorandum of Petitioner, App., p. 5, January 16, 1975 letter of the Solicitor of the Interior Department.

[40] Ibid, p. 4.

[41] Pet. B., p. 29.

Specifically, with 15 assessors, the Secretary has 770 man weeks annually to invest in assessment work. If 300 of these man weeks are required to reassess the 18,350 violations involved in this case, as asserted by the Secretary, the violations would be reassessed at the rate of about 62 violations per man week. With a force of 15 assessors, the 18,350 violations would be reassessed in about twenty weeks. Interestingly, if this same assessment rate (62 violations per man week) is applied for a full year's work by 15 assessors, we find that the number of violations that can be assessed in a year is slightly over 48,000. Thus, if 80,000 violations have to be assessed annually, the Assessment Office is falling behind in its assessment work under the present regulations by about 31,000 violations annually.[42]

Frankly, we doubt that such a serious deficit in assessments exists and we surmise that the irreconcilable nature of the data arises because the data submitted were prepared to support the arduous burden argument in respect to the 18,350 violations involved in this case, without taking the overall context into account. In any event, we submit that, at best, the Secretary has made a case of need for an appropriation with which to increase his force of assessors. This of course is a case which only the Congress can decide.

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[42] 18,350 violation ÷ 300 man weeks = about 62 violations per man week; 15 assessors x 52 weeks = 780 man weeks yearly; and 780 man weeks x 62 violations per man week = a yearly assessment rate of 48,360 violations.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

FRED BLACKWELL
1707 H Street, N.W.
Washington, D.C. 20006
Attorney for Respondents,
Delta Mining, Inc.,
G.M.W. Coal Company.

May 13, 1975

ADDENDUM

Add. 1

G. M. & W. COAL CO.
INC.
P. O. Box 99
State Line, Penna. 17263
Telephone: (717) 597-7803

June 7, 1972.

Assessment Officer
Department of the Interior
U. S. Bureau of Mines
Room 205-A
1725 K Street, N. W.
Washington, D. C. 20240

Attention: Mr. Everett Turner,
Assessment Officer

Re: G. M. & W. Coal Company, Inc.
Grove No. 1 Mine
Case No: 211C-3

Dear Mr. Turner:

We acknowledge receipt of your "final" order of assessment in the following alleged violations and in the following amounts:

Violation No.	Date Issued	Violation	Assessments
1 DWK	05-11-71	75.1712	$ 25.00
1 HKG	09-07-71	70.230	25.00
1 HKG	10-26-71	70.230	25.00
1 DHA	11-17-71	75.603	100.00
2 DSA	11-17-71	75.516	100.00
1 RCF	11-24-71	104(a) 75.400 75.403	5,000.00
2 DSA	12-01-71	75.307	25.00
		Total Assessed Amount	$5,300.00

This is to advise you that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of the penalties before the U. S. District Court.

BEST COPY AVAILABLE

We have expended a great deal of time and gone to considerable expense to present to your office facts and circumstances bearing on the six statutory criteria, and in no instance has your office shown any disposition to give any considerations to the merits of our position on any of the matters that we have presented. Your office has admitted that it has no discretion to deviate frim the published minimum penalty schedule, despite the footnote reference which authorizes lesser penalties and no authority to vacate a citation even if shown to be erroneous.

We do not believe that we can expect any different treatment from your departmental hearing examiners, who, we are informed, pursue a uniform and deliberate policy of escalating penalty assessments even higher. We are financially unable to expend money for legal fees, and we are unwilling to take our safety personnel away from the mines, for extended periods of time in order to engage in another lengthy, costly and fruitless administrative proceeding before the Department which serves as policeman, prosecutor, judge, and jury in the penalty proceedings and has shown itself unwilling and incapable of exercising objective adjudication., Based on past experience it is almost certain that such a proceeding would result in a further escalation of the penalties assessed.

As we read the Statute we are entitled to a hearing de novo in the District Court and we intend to avail ourselves of our statutory rights.

We also wish to advise you that we reserve all our rights to question the statutory and constitutional basis for your assessments and your statutory authority. We also reserve our right to question your arbitrary and capricious assumption of the right to establish and apply a pre-determined minimum penalty schedule in such a manner as to ignore the explicit statutory criteria.

Sincerely,
G. M. & M. COAL COMPANY, INC.

C Kenneth Cratsley

C. Kenneth Cratsley
Secretary-Treasurer

CKC/cdn

cc: Frederick R. Blackwell
Thomas J. MacBride
File

Public Law 92-173, December 30, 1969

83 STAT. 742

An Act To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

30 U.S.C. 819

PENALTIES

Sec. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard of who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking of the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which

were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Morton v. G.M.W. Coal Co., Inc.
No. 72-890, W.D. Pa.

Morton v. Delta Mining, Inc.,
No. 72-857, W.D. Pa.

EXTRACTS FROM

Hearing on Motions to Transfer commencing at 10:00 a.m. on Tuesday, January 16, 1973, in the United States District Court, Pittsburgh, Pennsylvania before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher
Assistant U.S. Attorney

On behalf of the Defendant:

Frederick R. Blackwell, Esquire.

* * *

[18] MR. BLACKWELL: Your Honor, I have in mind a motion for summary judgment after these depositions.

THE COURT: If the government says that you have violated a law and you say that you haven't, I cannot grant you a motion for summary judgment. I know that you big law firms file all these motions; I did the same thing myself.

MR. BLACKWELL: Sir, I am a solo practicioner.

THE COURT: Successful sole practicioners do it. I was a sole practicioner.

* * *

[19] THE COURT: The case is so simple. You either did or did not violate the law. It is a question of credibility.

The government will have witnesses come in and say that you did. You, more than likely, will have witnesses come in and say that you didn't. The judge has to decide.

MR. BLACKWELL: We believe that there is more to the case than that. We believe that the [20] civil penalty procedures are illegal under the Act, Your Honor. And we believe the assessment –

THE COURT: I have previously ruled that they are not but you always have the right to ask questions. I don't see anything involved in this case at all. I can't see anything puzzling about it at all.

The government says that they have followed the basic, fundamental tenets required by the Act in assessing the penalty; you say they didn't. The court hears it de novo. It is just a question of calling your witnesses and the judge decides who he is going to believe. You don't have the substantial evidence rule. I don't care what is in record; that doesn't concern me. It is what they say in the Courtroom that matters.

MR. BLACKWELL: Our position, Your Honor, is that if the assessment were illegally made and if their procedures did not conform to the statute, they do not have a legal entity which they can come into Court and force the client into a de novo trial.

THE COURT: The government says that they did it in their complaint, did they not?

MR. BLACKWELL: Yes.

THE COURT: You say that they did [21] not. So, I have to hear the evidence on whether they did or didn't. How can any Court decide it without hearing the witnesses?

MR. BLACKWELL: Well, my analysis of the case is that if the government is wrong in their illegal assessment procedure, then there will not be a hearing of the witnesses on the violation.

THE COURT: How is any judge going to decide whether they are right or wrong?

MR. BLACKWELL: On the illegality of the procedure?

THE COURT: What you were just talking about.

MR. BLACKWELL: I believe that we will be able to show that from the testimony that we receive from the Assessment Officer, Mr. Turner.

THE COURT: That can all be brought out at the time of trial. Why make this case hard when it can be easy?

MR. BLACKWELL: Well, my view of it, Your Honor, is if we are right on the assessment procedure being illegal, there should not be a trial. This should be resolved in the motion that I was –

THE COURT: I deny such a motion. I am going to hear the whole case as I have told you on the 14th day of February, 1973, at 10:00 a.m.

MR. BLACKWELL: Thank you very much, Your Honor.

* * *

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: Bates Mining, Incorporated
Operator

Mine No. 2312

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE

NOTICE OR ORDER OF ASSESSMENT DATED April 11, 1972

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward M. Turner
ASSESSMENT OFFICER

BEST COPY AVAILABLE

Add. 10

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: C. H. and V. Coal Company, Incorporated
Operator

Case No. 2110-2

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____

PROPOSED ORDER OF ASSESSMENT DATED December 27, 1971

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward L. Furman
ASSESSMENT OFFICER

Add. 11

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: C. H. and V. Coal Company, Incorporated
Operator

Case No. 2110-1

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE Amended

PROPOSED ORDER OF ASSESSMENT DATED May 31, 1972

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward L. Furman
ASSESSMENT OFFICER

BEST COPY AVAILABLE

Title 30 – MINERAL RESOURCES

Chapter 1 – Bureau of Mines,
Department of the Interior

SUBCHAPTER 0 – COAL MINE HEALTH AND SAFETY

PART 100 – CIVIL PENALTIES FOR VIOLATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter 0 of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100 as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maximum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry. Part 100 shall

become effective on the date of its publication in the Federal Register (1-16-71)

Fred J. Russell,
Under Secretary of the Interior.

January 14, 1971.

* * *

§100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the

demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued

order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

* * *

Title 30 – MINERAL RESOURCES

Chapter 1 – Bureau of Mines,
Department of the Interior

SUBCHAPTER 0 – COAL MINE HEALTH AND SAFETY

PART 100 – CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

On June 8, 1972, appearing in 37 F.R. 11459, the Department of the Interior published amendments to the procedural rules applicable to hearings in civil penalty cases under the Federal Coal Mine Health and Safety Act of 1969. These amendments were primarily contained in Part 4, Title 43, Code of Federal Regulations with conforming amendments in Part 100, Title 30, Code of Federal Regulations. To provide the public with an opportunity to become familiar with the new procedure and insure an orderly changeover, the regulations were not to be effective until June 15, 1972. However, in making these conforming amendments, §§100.3(d), (e), and (f) which should have been amended were inadvertently omitted. The purpose of this document is to properly conform §100.3. In making these conforming amendments §100.3(h) has also been modified. These conforming amendments to §100.3 make clear that a party may petition for hearing either upon receipt of the initial proposed order of assessment or upon receipt of an affirmed or amended proposed order of assessment. In addition, the time periods for filing an informal protest or a formal petition for hearing are made identical.

These procedural rules are used extensively throughout the coal mining industry and are often used by parties who are not attorneys. To allay any uncertainty these parties may have and to provide a complete and convenient reference to Part 100, the Department has decided to republish Part 100 as amended in its entirety. These amendments to Part 100, Title 30, Code of Federal Regulations, are effective June 15, 1972.

Richard R. Hite
Deputy Assistant Secretary
of the Interior.

June 13, 1972.

* * *

§100.3 Procedures for assessment of civil penalties; protest procedures.

* * *

(h) The operator or miner charged shall have 20 days from the date of receipt of an amended or reissued proposed order to accept the proposed order, or to reject such order in whole or in part and petition for hearing and formal adjudication. Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary.

RULES AND REGULATIONS

[39 F.R. 27558]

Part 100 – Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

REVISION AND REINSTATEMENT OF PROCEDURES FOR INFORMAL ASSESSMENT

There was published in the Federal Register on May 8, 1974 (39 FR 16145-16151) proposed procedures for informal assessment of civil penalties for violations of the Federal Coal Mine Health and Safety Act of 1969. These proposed regulations were preparatory to reinstatement of the informal assessment program contained in Title 30, Code of Federal Regulations, Part 100, which had been suspended on April 24, 1973 (38 FR 10085). This suspension was in effect pending appeal of a decision and order of the United States District Court for the District of Columbia in "National Independent Coal Operators Association, et al. v. Rogers C.B. Morton, Secretary of the Interior, et al.," Civil Action No. 397-72 in which the District Court had declared unlawful the procedures set forth in 30 CFR Part 100. On February 11, 1974, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and upheld the validity of the Department's civil penalties procedures.

* * *

[39 F.R. 27559]

The National Independent Coal Operators Association did not offer substantive comments on the regulations but rather criticized them as being illegal. As a precedent they cited the decision of the U.S. Court of Appeals for the Third Circuit in "Rogers C.B. Morton, et al. v. Delta Mining, Inc., GM&W Coal Corporation and Edward

Mears, et al.," Nos. 73-1752, 1753 and 1848. The NICOA argues that any assessment procedures which does not require the submission of a penalty case to an administrative law judge for findings of fact in accordance with the Administrative Procedure Act is illegal.

The Third Circuit decision is in conflict with the District of Columbia Circuit decision mentioned above. However, in the Department's view the new procedures set forth below are in accord with both the District Court, and the Third Circuit decision. The Third Circuit distinguished the District of Columbia Circuit's decision on the basis that the operator had filed a protest. Under these rules where an operator requests a conference (the equivalent of the old protest), all unresolved violations are forwarded to the Office of the Solicitor for filing with the Office of Hearings and Appeals to permit an opportunity for hearing and findings of fact by an administrative law judge.

Much effort has gone into preparation of these new procedures and the Department considers them to be a substantial improvement. The Department believes that this system permits a fair evaluation of the violation at an informal level. The new procedures will be reviewed periodically and additional improvements will be implemented.

The new rules will become effective August 1, 1974.

Kent Frizzell,

Acting Secretary of the Interior.

July 24, 1974.

* * *

§100.6 Request for conference.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a conference. Upon receipt of such request, the Office of Assessments shall arrange for a timely conference convenient to both the operator or miner and the Office of Assessments.

(b) If the operator or miner requests a conference with the Office of Assessments, he may submit any additional material to the official assigned his case which may be relevant to the fact of the violation or the amount of the penalty. Such information may be submitted prior to the conference and discussed during the conference. To expedite the conference, the official assigned to the case may contact the operator or miner to discuss the case prior to such conference.

(c) The Office of Assessments will consider all relevant information on the violation(s) in question presented by the operator or miner and is authorized to recalculate the assessed penalty to it. When the facts warrant a finding that no violation of the Act or a mandatory health and safety standard occurred, a penalty will not be assessed.

(d) If the operator or miner appears in person and the issues are resolved, he may, at this time, tender payment of the amount agreed upon and thereby dispose of the case, or he may have 10 days within which to to submit payment to the Office of Assessments of the amount agreed upon and thereby dispose of the case. All such agreements must be in writing and signed by both parties. Failure to tender payment of the agreed amount within the 10-day period will result in the agreed

amount being entered as the final order of the Secretary, enforceable under section 109(a)(4) of the Act.

(e) If all issues cannot be resolved during the conference, the operator or miner may settle those violations in agreement as provided in §100.6(d) and have those deleted from the case. Violations not resolved will be forwarded to the Associate Solicitor – Mine Health and Safety, who shall file a petition to assess a civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

* * *

TITLE 43 – PUBLIC LANDS: INTERIOR
SUBTITLE A – OFFICE OF THE
SECRETARY OF THE INTERIOR

PART 4 – DEPARTMENT HEARINGS AND APPEALS PROCEDURES

SUBPART F – SPECIAL RULES APPLICABLE TO MINE HEALTH AND SAFETY HEARINGS AND APPEALS

Amendment of Civil Penalty Assessment Procedures Under the Federal Coal Mine Health and Safety Act

* * *

1. Sections 4.540 through 4.545 subpart F of Subtitle A of Title 43 of the Code of Federal Regulations are amended to read as follows:

§4.540 *How initiated.*

(a) A proceeding for the assessment of a civil penalty shall be initiated by the Bureau by filing a petition to assess civil penalty with the Office of Hearings and Appeals.

(b) The Bureau's petition for assessment of civil penalty shall include a list of the cited violations for which a civil penalty is sought to be assessed. Each cited violation shall be identified by number and date of the notice or order involved and the section of the Act or regulations which the Bureau alleges has been violated.

(c) A copy of each notice or order issued concerning each cited violation for which a civil penalty is sought to be assessed shall be attached to the petition.

(d) Where appropriate the Administrative Law Judge (formerly titled Hearing Examiner) shall consolidate civil penalty proceedings with other proceedings described herein.

* * *

[Extract from PL 91-510]

CONFERENCE REPORTS

Sec. 125. (a)(1) The section caption of section 135 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190c) is amended to read as follows:

"SENATE CONFERENCE REPORTS".

(2) Section 135 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190c) is amended by adding at the end thereof the following new subsections:

"(c) *Each report made by a committee of conference to the Senate* shall be printed as a report of the Senate. As so printed, such report *shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate.* Such statement shall be sufficiently detailed and explicit to inform the Senate as to the effect which the amendments or propositions contained

in such report will have upon the measure to which those amendments or propositions relate.

"(d) If time for debate in the consideration of any report of a committee of conference upon the floor of the Senate is limited, the time allotted for debate shall be equally divided between the majority party and the minority party.".

(3) The item relating to section 135 contained in the table of contents of the Legislative Reorganization Act of 1946 (60 Stat. 813) is amended to read as follows:

"Sec. 135. Senate Conference Reports.".

(b)(1) Paragraph (c) of clause 1 of Rule XXVIII of the Rules of the House of Representatives is amended to read as follows:

"(c) *Each report made by a committee of conference to the House* shall be printed as a report of the House. As so printed, such report *shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate.* Such statement shall be sufficiently detailed and explicit to inform the House as to the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate.".

(2) Clause 2 of Rule XXVIII of the Rules of the House of Representatives is amended to read as follows:

"2. It shall not be in order to consider the report of a committee of conference unless such report and the accompanying statement shall have been printed in the Record, at least three calendar days (excluding Saturdays, Sundays, and legal holidays) prior to the consideration of such report by the House; but this provision does not apply during the last six days of the session.

Nor shall it be in order to consider any conference report unless copies of the report and accompanying statement are then available on the floor. The time allotted for debate in the consideration of any such report shall be equally divided between the majority party and the minority party.".

(3) Clause 3 of Rule XXVIII of the Rules of the House of Representatives is amended –

(1) by striking out ", but their report shall not include matter not committed to the conference committee by either House."; and

(2) by inserting in lieu thereof the following: ", but the introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement. Moreover, their report shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee.".

(Emphasis supplied).

[EXTRACT FROM]

Calendar No. 192

91st Congress
1st Session

SENATE REPORT No. 91202

Legislative Reorganization Act of 1969

May 23, 1969
Ordered to be printed

Mr. Mundt, from the
Committee on Government Operations
submitted the following

Report

[to accompany §844]

* * *

Conference Reports

Under existing rules and practice, conference reports are printed as House Reports and must be signed by both Senate and House conferees. However, the statement accompanying such report explaining the action taken in conference, is filed only by the House conferees, as required by the rules of that body. The Rules of the Senate make no provision for the filing by Senate conferees of an accompanying statement. Furthermore, the precedents of the House of Representatives do not permit the filing by House conferees of minority or individual views, and the time for debate is limited strictly.

The Joint Committee On The Organization Of The Congress, in recommending liberalization of conference procedures, noted that the conference committee is one of the most vital links in the bicameral Congress, since it operates on an *ad hoc* basis for a single bill; its grant of legislative authority is enormous; it must reconcile the differences in legislation on the same subject matter

passed by the two Houses; and rejection of a conference report by either House means the death of the entire bill. Accordingly, it recommended that the membership of the Senate be given an opportunity equal with that of the House to inform itself adequately on a conference report, prior to a vote; and that the minority be given full opportunity to express its views, both in writing and during the final debate.

S. 844 would implement these recommendations by (1) requiring that conference reports be printed as a report in each House and be accompanied by an explanatory statement prepared by the conferees from that House, thus conforming Senate practice to that of the House; (2) permitting any conferee to file an individual explanatory statement as an appendix to the statement of the conferees of his House; and (3) requiring that the minority be allotted half of the time allotted for debate on a conference report if debate is limited.

* * *

[Descriptive Heading and Signature Pages
of Conference Report on S. 1917]

HOUSE OF REPRESENTATIVES

91st Congress
1st Session

Report No. 91-761

FEDERAL COAL MINE HEALTH AND SAFETY ACT

December 16, 1969 — Ordered to be printed

Mr. Perkins, from the committee of conference,

submitted the following

CONFERENCE REPORT

[To accompany S. 2917]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2917) to improve the health and safety conditions of persons working in the coal mining industry of the United States, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

* * *

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill, and agree to the same.

Carl D. Perkins,
John H. Dent,

Roman Picinski,
Augustus F. Hawkins,
Patsy T. Mink,
Phillip Burto n,
Will H. Ayres,
John N. Erlenborn,
Alphonzo Bell,
Dominick V. Daniels,
John M. Ashbrook

Managers on the Part of the House.

Harrison Williams,
Jennings Randolph,
Clai Pell,
Gaylord Nelson,
Walter F. Mondale,
Thomas F. Eagleton,
Alan Cranston,
J. Javits,
Winston Prouty,
Richard S. Schweiker,
Wm. B. Saxbe,
Ralph T. Smith,

Managers on the Part of the Senate.

STATEMENT OF MANAGERS ON THE PART OF THE HOUSE

* * *

Carl D. Perkins,
John H. Dent,
Roman Pucinski,
Augustus F. Hawkins,
Patsy T. Mink,
Phillip Burton,

William H. Ayres,
John N. Erlenborn,
Alphonzo Bell,
Dominick V. Daniels,
John M. Ashbrook,

Managers on the Part of the House.

[Descriptive Heading and Signature Pages of a Conference Report on bill handled after enactment of Legislative Reorganization Act of 1970]

HOUSE OF REPRESENTATIVES

93d Congress
2d Session

Report
Report No. 73-1175

COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT

July 3, 1974 – Ordered to be printed

Mr. Perkins from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 3203]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3203) to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

* * *

And the House agree to the same.

Carl D. Perkins,
Frank Thompson, Jr.,
William D. Ford,
W.L. Clay,
Albert H. Quie,
John M. Ashbrook,

Managers on the Part of the House.

And the Senate agree to the same.

Harrison Williams,
Jennings Randolph,
Claiborne Pell,
Gaylord Nelson,
Thomas F. Eagleton,
Harold E. Hughes,
W.D. Hathaway,
Alan Cranston,
J. Javits,
Richard S. Schweiker,
Robert Taft,
Robert Stafford,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

* * *

And the House agree to the same.

Carl D. Perkins,
Frank Thompson, Jr.,

William D. Ford,
W.L. Clay,
Albert H. Quie,
John M. Ashbrook,

Managers on the Part of the House.

And the Senate agree to the same.

Harrison Williams,
Jennings Randolph,
Claiborne Pell,
Gaylord Nelson,
Thomas F. Eagleton,
Harold E. Hughes,
W.D. Hathaway,
Alan Cranston,
J. Javits,
Richard S. Schweiker,
Robert Taft,
Robert Stafford,

Managers on the Part of the Senate.

[Extract From Bureau of Mine Brief]

IN THE MATTER OF:	)	
ROBERT G. LAWSON	)	Docket No. NORT 71-106-P
t/a ROBERT G.	)	
LAWSON COAL CO.	)	CIVIL PENALTY PROCEEDING
No. 3 Mine	)	

Appellant

BRIEF OF APPELLEE, BUREAU OF MINES

* * *

These regulations set up machinery whereby, in the first instance, coal mine operators are assessed a civil penalty, for appropriate violations of the Act, by an Assessment Officer in the Bureau. Any proposed final Order of Assessment issued by such officer is simply in the nature of an offer of compromise. The operator is free to accept or reject the Order. While the proposed Assessments are uniform as to the industry as a whole, once an operator exercises *his* option to reject such final order and seek formal adjudication, all that transpired before the Assessment Officer is immaterial and irrelevant to the Department's Office of Hearings and Appeals. Formal adjudication is instituted by the Solicitor's Office at such time as it files a Petition for Assessment of Civil Penalty with the Hearings Division, Office of Hearings and Appeals. When an operator demands formal adjudication he is not appealing the Assessment Officer's final Order. Once the operator requests formal adjudication the proceeding is *de novo*.

* * *

Thomas J. MacBride
Attorney-at-Law

P. O. Box 108
100 Wynnecrest Drive
Waynesboro, Pa. 17268
717-762-6338

5.3.0-

3/72. Review Et

'72 MAR 23 PM 1:04

March 17, 1972

Mr. Frederick R. Blackwell
Attorney At Law
Suite 860 Bender Building
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

RE:G. M. & W. COAL CO., INC.
Case No. 2110-3
Grove No. 1. Mine

Dear Fred:

The assessment inthis case is Five Thousand Three Hundred Dollars ($5,300.00) and the violations taken chronologically from the Order are as follows:

FILE NO. 25 - Section 75.1712: This is a bath house facility violation. The difficulty in this case involved the acquiring of the land onwhich to locate the building. The land to which the company had title and possession was all filled land from the former stripping operation. After considerable difficulty the necessary small piece of ground was acquired and the company ran into the difficult position of securing sewerage disposal permits. After prolonged efforts these were secured and work was promptly begun. Work on this facility has now been completed. The company moved with all possible speed in this matter, it must also be remembered that this was a newly opened mine.

FILE NO. 27 - Section 70.230: This is a failure to submit current sampling in section .003. Four (4) samples had been taken and a mine inspection team from the Bureau of Mines came in and advised Mr. Davis, the mine engineer, that he could stop sampling since they were there and would be sampling. This appeared to be a rather lengthy mix-up and even the District Office recognized this mix-up since they extended the period within which it was to be abated four (4) times. There is not much of a defense besides this and the sampling

was started again and is okay.

FILE NO. 31 - Section 70,230: This is another dust sampling violation in section .004. The only statement that we can make is that we were having trouble coursing the air around the mining machine and until air regulators on the return were completed any samples submitted would have been badly in violation. The sampling simply was not done, until the air problem was resolved.

FILE NO. 34 - Section 75.603: This involves a temporary splice nine (9) feet from the machine. There is no defense as the splice was there. The men know better and the operator will "raise hell" in an effort to see that it never happens again.

FILE NO. 33 - Section 75.516: This was a power cable not on insulators violation. The violation charged actually occured, however, the operator has tried repeatedly to hire experienced electricians, they just are not available. The operator has been trying to train two (2) new electricians at this time and although training is moving at a reasonably good pace, nevertheless, the additional requirements of training these men to be aware of compliance standards as well as the technical aspects of their jobs has extended their training periods. The men were finally impressed with the need for picking the cable up, it was hung on aluminum wire hooks rather than insulators which were available. It would seem that this violation should not carry more than the minimal fine.

FILE NO. 36 - Section 104(a) 75.400 & 75.403: This was an eminent danger violation and we can only point out that this was the case where the mine inspector "eyeballed" the situation and concluded that the rock dust was inadequate. The violation occured at the place where the bottom is badly slanted and loose coal was being dropped from the shuttle cars on occassion. The bottom was extremely wet and sloppy and the inspector in attempting to sample the area found the loose coal to be so wet that it could not even be sifted for the sample. We feel that this is a violation which was "eyeballed" by the inspector during a planned "loose coal and coal dust drive". The company had at

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this time made a commitment for a Thirty Thousand Dollar ($30,000.00) new scoop which has been delivered and is used to pick up even the wet spill coal.

FILE NO. 35 - Section 75.307: This is a methane violation and about the only explanation is the human element. Both the foreman and the operator had methane measuring devices in their possession. The operator was a new man and explained to the foreman that with the examiner standing over him he felt uncomfortable and admitted to becoming rather excited and simply forgot to make the methane examination when he was "under the gun".

Very truly yours,

Thomas J. MacBride

TJM/cdh
CC: G. M. & W. COAL CO., INC.
file

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

NOV 19 1973

Mr. Frederick R. Blackwell
Attorney at Law
Suite 860
Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Delta Mining, Inc.
G M & W Coal Co., Inc.

Dear Mr. Blackwell:

We are in receipt of your two checks totaling $13,467.00. This payment is accepted in full settlement of the cases listed in your letter of November 9, 1973.

Thank you for your cooperation.

Very truly yours,

John P. McGeehan
Trial Attorney

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November 9, 1973

John P. McGeehan
Attorney, MESA
U. S. Department of the Interior
Office of the Solicitor
Washington, D. C. 20240

Re: Settlement of Bureau of Mines proposed civil penalties against G.M.&W. Coal Co., Inc. (Grove Mine # 1 and Metro 333 Mine) and Delta Mining, Inc.

Dear Mr. McGeehan:

I am writing in regard to the above which covers the following Bureau of Mines proposed civil penalties and/or civil penalty assessment orders:

G. M. & W. COAL CO., INC.

Grove Mine # 1		
[illegible]21-10	May 31, 1972	$3675.
21-10-4	June 27, 1972	1930.
21-10-05	December 29, 1972	7845.
21610-21	February 9, 1973	685.
21-10-22	February 12, 1973	555.
21-10-23	February 12, 1973	1070.
Metro #3 Mine		
22-65	April 23, 1971	325.
22-65-1	June 6, 1972	1850.
22-65-2	August 16, 1972	5130.
22-65-3	June 6, 1972	5960.
22-65-4	July 28, 1972	815.
22-65-21	February 28, 1973	365.

DELTA MINING, INC.

23-12-1	August 9, 1972	$565.
23-12-2	September 8, 1972	455.
23-12-3	October 18, 1972	280.
23-12-4	October 24, 1972	905.
23-12-21	February 2, 1973	750.

In final satisfaction, disposition, and settlement of the above listed proposed civil penalties and/or civil penalty assessment orders, but without making any, or implying any, admission that any of the involved alleged violations of standards under the Coal Act did in fact occur, and solely for business considerations, I am enclosing checks totalling $13,467. in full payment of the foregoing civil penalties and/or civil penalty assessment orders. This payment is made by the two enclosed checks payable to the order of the U. S. Dept. Interior as follows: (1) Delta Mining, Inc. check #1278, dated November 1, 1973, in the sum of $2,180. and (2) G. M. & W. Coal Company Inc. check #505. dated November 1, 1973, in the sum of $11,287.

Yours sincerely,

Frederick R. Blackwell

cc:
Dwight L. Grove
Thomas J. MacBride

sb

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-521

ROGERS C.B. MORTON,
SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.,
G. M. & W. COAL COMPANY, INC.,
AND
EDWARD MEARS, *et al.*,
d/b/a M. Y. COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF RESPONDENT EDWARD MEARS, *et al.*

JOHN L. KILCULLEN
Webster, Kilcullen &
Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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AND
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF RESPONDENT EDWARD MEARS, *et al.*

The nub of the question presented here is whether the penalty assessment orders for which the Secretary sought enforcement in the district court were issued in conformity with the statutory procedures mandated under section 109(a) of the Act. The district court held

they were not, and the Court of Appeals agreed that they were not.

In the case of respondent Mears, two penalty assessment orders were issued by the Bureau of Mines Assessment Officer, one in the amount of $680 and the other in the amount of $1320. The proposed assessment orders were on pre-printed forms which contained no information other than a listing of various violation notice numbers, the dates they were issued, and the amount of the penalty assessments.[1] The assessment orders did not include any findings of fact that the cited violations had occurred nor did they furnish any information as to the basis on which the Assessment Officer arrived at the amounts of the penalties assessed, or indicate the nature of any procedural actions which may have taken place in connection with issuance of the assessment orders. Each assessment order was accompanied by a form letter from the Assessment Officer stating that unless, within 15 days, the mine operator filed a protest or a request for formal adjudication the proposed assessment order would become the final order of the Secretary.[2]

Respondent Mears filed timely protests to each of the proposed assessment orders, but subsequently received form letters from the Assessment Officer stating simply that the proposed assessment orders had been affirmed and would become final unless a request for formal adjudication was filed within 15 days.

[1] The two assessment orders are found at pages 108 and 111 of the Appendix.

[2] The form letters are reproduced as an Addendum to this brief, pp. 1 and 2.

(Addendum, pp. 3 and 4). No explanation was given as to whether or to what extent the Assessment Officer gave any consideration to the information furnished in respondent's protest letters, or the grounds on which the Assessment Officer rejected his protests and affirmed the original assessment orders.

The Secretary of the Interior thereafter filed in the district court a complaint for enforcement of the penalty assessment orders, and attached to his complaint an administrative record consisting in its entirety of the two proposed orders of assessment and two pre-printed finding of fact forms reciting that

> "I HEREBY FIND THAT THE VIOLATIONS CITED IN THE PROPOSED ORDER OF ASSESSMENT DATED _____, DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.
>
> EVERETT TURNER
> ASSESSMENT OFFICER"

The date filled in on each of the finding of fact forms was a date several months after the date shown on the respective assessment orders. (App. 107, 110). The finding of fact forms were not served on respondent Mears at any time prior to the filing of the complaint for enforcement.

Respondent Mears filed a motion for judgment on the pleadings, or in the alternative for summary judgment, on grounds that the assessment orders were not lawfully issued pursuant to and in accordance with the civil penalty provisions of section 109(a) of the Act. In granting respondent's motion the district court concluded that section 109(a) requires that all final assessment orders must be supported by a decision incorporating findings of fact that the charged vio-

lations did occur and the amount of the penalty which is warranted. On appeal by the Secretary the Court of Appeals held that in the absence of express findings of fact relating to the statutory criteria for determining the amount of the penalty the assessment orders provided no assurance of any considered application of these criteria, and failed to satisfy the requirements of section 109(a)(3).

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE RECORD BEFORE IT FAILED TO DISCLOSE THE BASIS FOR THE PENALTY ASSESSMENT ORDERS

The penalty assessment orders against respondent Mears were admittedly not preceded by an administrative determination that the charged violations had in fact occurred, and there was no showing that the penalties were determined in accordance with the six statutory criteria specified in section 109(a)(1) of the Act. The District Court had nothing before it to show how or in what manner the penalties were computed or whether they were lawfully determined in accordance with the statutory standards, and it thus had no basis for making a reasoned judgment respecting the appropriateness of the assessed penalties.

In his complaint for enforcement the Secretary was, in effect, asking the district court to blindly accept the validity of the assessment orders and render judgment against respondent Mears in the amount of the assessed penalties without any supporting administrative decision or factual findings which would reveal the reasons or

basis for the Secretary's action. In these circumstances the district court clearly had no choice other than to refuse enforcement and grant summary judgment for respondent.

There is even a question as to whether the district court had jurisdiction to entertain the complaint for enforcement inasmuch as it was not accompanied by a decision of the Secretary incorporating his findings of fact. The jurisdiction of the district courts to enforce penalty assessment orders of the Secretary is derived from section 109(a)(4) of the Act which specifies that upon filing a petition for enforcement:

> "The court shall have jurisdiction to enter a judgement enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order and decision* of the Secretary . . ." (Emphasis added).

As is evident, the statute by its terms authorizes enforcement of an "order and decision of the Secretary", and, accordingly, where the Secretary, as in the instant case, seeks enforcement of a naked order with no supporting decision the court lacks jurisdiction to grant enforcement of such an order.

On the state of the record the district court correctly decided that respondent was entitled to summary judgment. Since the Court did not have before it the requisite "order and decision of the Secretary" it could not, under section 109(a)(4), grant the Secretary's petition for enforcement.

THE POSSIBILITY OF DE NOVO TRIAL IN THE DISTRICT COURTS DOES NOT CURE THE DEFECTS IN THE SECRETARY'S ASSESSMENT PROCEDURES

The Secretary argues that his penalty assessment orders need not be accompanied by findings of fact or an administrative record because section 109(a)(4) provides for a *de novo* trial of all relevant issues in any proceeding brought in the district courts for enforcement of such orders. (Brief, p. 23).

This novel line of reasoning proceeds on the premise that even if the Secretary grossly disregards the statutory standards and procedures in issuing penalty assessment orders such orders are nevertheless valid because the underlying facts may be litigated *de novo* in the district courts. It also involves an assumption that the Secretary can abdicate his responsibility for administratively determining the facts as to either the occurrence of a violation or the appropriate penalty amount, and, by utilizing a mechanical procedure for grinding out *pro-forma* assessment orders, dump these functions into the lap of the district courts.

Such a procedure is inconsistent with established concepts and principles of administrative law. An administrative agency cannot seek the aid of the courts to enforce agency orders which have been improperly or invalidly issued. The adjudicative functions of an administrative agency must be carried out in accordance with, and in the mode prescribed by the statute investing it with the power to act, and an attempt by an agency to exercise a power without compliance with the procedural provisions laid down in the statute as to the manner of its exercise if a nullity. *CAB v. Delta*

Airlines 367 U.S. 316, 6 L.Ed.2d 869 (1961); *Peters v. Hobby* 349 U.S. 331, 99 L.Ed. 1129 (1955); *Stark v. Wickard* 321 U.S. 288, 88 L.Ed. 733 (1944). Failure of an administrative agency to make express findings of fact where such findings are required renders the administrative determination void. *United States v. Chicago, Milwaukee and St. Paul R.R.* 294 U.S. 499, 79 L.Ed. 1023 (1935).

It follows that where, as here, an agency has by-passed and disregarded the statutory standards for carrying out its adjudicative functions it cannot be heard to argue that its orders are nonetheless valid because the procedural deficiencies can be cured by a *de novo* trial in the district courts. Such an argument makes a mockery of the rules of administrative law.

THE DE NOVO TRIAL PROVISION IS AMBIGUOUS AT BEST

A further point to be noted is that the language of section 109(a)(4) respecting *de novo* consideration of factual issues in enforcement actions in the district courts states that:

> "The court shall consider and determine de novo all relevant issues, *except issues of fact which were or could have been litigated* in review proceedings before a court of appeals under section 106 of this Act. . ." (Emphasis added).

Because of this qualifying language the Secretary has previously taken the position that any issues of fact which *could have been litigated* in review proceedings under section 106 are not subject to trial *de novo* in the district courts. In practical effect this means that no

factual issues can be tried *de novo* since virtually all facts involved in every violation notice issued by a mine inspector are potentially subject to review proceedings under the Act, and thus "could have been litigated" under section 106. This very issue was raised before the district court below in the *Delta Mining Company* case, and government counsel took the position that since the factual issues respecting the charged violations could have been adjudicated in a Court of Appeals review under section 106 they could not be litigated *de novo* in the district court. He argued: "There were two opportunities at the administrative level before these proceedings to litigate this and the respondent failed to take advantage of these. He cannot again be given the opportunity to litigate the fact of the violation."[3]

Thus, the government, is now presenting to this Court an argument which is the polar opposite of the position it has asserted in enforcement cases in the district courts when the question of *de novo* litigation of factual issues has been raised.

THE SECRETARY CANNOT ASSESS PENALTIES WITHOUT MAKING THE STATUTORILY MANDATED FINDINGS AND DETERMINATION

The Secretary argues that the procedure prescribed in section 109(a)(3) was designed only to provide the person charged with a violation an *opportunity* for a public hearing. The government's brief states (p. 19):

[3]See Transcript of Pretrial Conference in *Morton v. Delta Mining Inc.*, p. 39, App. pp. 22-43.

"In our view the statutory language requires a decision incorporating findings of fact only when the mine operator has taken advantage of his 'opportunity for a public hearing'. . . . Thus, when a public hearing is held, the operator is entitled to a determination by 'decision incorporating findings of fact' that the violation occurred and that the penalty is warranted."

If, as thus contended, the Act requires the Secretary to make a *determination* only when a public hearing is held, it would follow that, absent a hearing, he may assess penalties in any casual manner he sees fit, and can apply whatever arbitrary schedule of penalty amounts may suit his fancy, as, indeed, he has done under the Part 100 assessment procedure.

Such a procedure cannot be supported by any reasonable interpretation of the statutory language which, by its plain words, directs the Secretary to *determine* both the fact of the violation and the amount of the penalty, and requires that he must consider six specific criteria for purposes of determining the penalty amount in each case. In the present case the record shows that the Secretary made no *determination* at all, but simply authorized issuance of the penalty assessment orders on the basis of a pre-set penalty schedule, and, notwithstanding the operators protest, treated such assessment orders as final and enforceable.

Although the record contains nothing to show that consideration was given to the six statutory criteria, the government's brief attempts to provide a rationale for the penalty amounts. In its brief the government attempts to explain that the assessment officer may have considered certain of the charged violations to be serious, and others nonserious, and could have applied

the gravity and negligence factors in a manner so as to arrive at penalty amounts in the lower levels of those permitted under the Secretary's published penalty schedule. (Brief, p. 32). The brief asserts that in the substantial number of cases the size of the penalty itself "indicates that the criteria were applied favorably", and consequently, "requiring findings by the Secretary showing the factors underlying the Secretary's decision to be lenient does not serve any interest of the operator." (Ibid).

This after-the-fact attempt to explain the rationale for a penalty assessment is no substitute for a contemporaneous agency decision spelling out the reasons for its action and the manner in which the statutory criteria were applied in arriving at its determinination. This Court as well as other courts have almost universally held that governmental agencies must articulate the underlying reasons or rationale for their administrative orders if such orders are to be upheld and enforced by the courts. In *NLRB v. Metropolitan Life Ins. Co.* 380 U.S. 438, 13 L.Ed.2d 951 (1965) this Court refused enforcement of a bargaining unit determination of the Labor Board because of the failure of the Board to document the reasons for the distinctions between its decisions in various other bargaining unit cases. In so holding the court stated:

> "Although Board counsel in his brief and argument has rationalized the various unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, *the integrity of the administrative process requires that courts may not accept counsel's post hoc rationalizations for agency actions. For reviewing courts to substitute counsel's rationale for that of the Board is incompatible with the orderly function of the process of judicial review.*" 380 U.S. at 444. (Emphasis added).

In *Rayonier, Inc. v. NLRB* 380 F.2d 187 (CA5 1967), it was held that the courts cannot provide a meaningful review of Board decisions if the Board refuses to explain its rulings. "If the Board's decisions are to withstand the challenge of judicial review, it should be due to the Board's open, logical, and rational reliance on the stated criteria. If the courts rationalize and apologize for unsupported Board decisions, then the system of judicial review will have failed to provide the salutory objective considered essential to an effective and fair quasi-judicial administration of law." 380 F.2d at 195.

THE ASSESSMENT ORDERS AGAINST RESPONDENT MEARS NEVER BECAME ADMINISTRATIVELY FINAL

Apart from the Secretary's failure to make the required findings and determinations, there is a further reason why the assessment orders issued to respondent Mears are unenforceable. This reason derives from the fact that the drafters of the Part 100 regulations neglected to include a provision whereby amended or reissued assessment orders of the type here involved would become final orders of the Secretary.

The record shows that upon receipt of each of the two assessment orders respondent Mears filed protests with the assessment officer, and the assessment officer then reissued the two amended proposed assessment

orders, which he later treated as final assessment orders of the Secretary of the Interior.

The Part 100 regulations as promulgated January 17, 1971 provided (section 100.4(e)) that where an operator failed to timely protest an initial proposed assessment order "he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior." However, where the operator filed a timely protest and the assessment officer sent him an amended or reissued proposed assessment order the regulations explicitly provided that such amended or reissued proposed assessment order would become the final order of the Secretary only if accepted by the operator. The applicable section, 100.4(h), stated:

> "The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing."

This is as far as the regulation went. It did not inform the operator that if he did not accept the amended or reissued order, or did not request adjudication, it would become the final order of the Secretary. Almost a year and a half after promulgation of the Part 100 regulation the Secretary discovered this critical omission in the language of section 100.4(h), and, on June 15, 1972 published in the Federal Register an amendment revising section 100.4(h) to read:

> "(h). The operator or miner charged shall have 20 days from the receipt of an amended or reissued proposed order to accept the proposed order, or to reject such proposed order in whole or in part and petition for hearing and formal adjudication. *Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary.*" (Emphasis added).

Thus, the procedural gap in the language respecting finality of reissued or amended proposed assessment orders was not closed until some time after the purported finality of the two reissued assessment orders served on respondent Mears,[4] and under the explicit language of the regulation in effect at the time of these orders neither the assessment officer nor the Secretary was empowered to treat them as final orders.

The virtually universal rule recognized by the courts is that regulations promulgated by governmental establishments are binding on the agency and its administrative officers. *Service v. Dulles* 354 U.S. 363, 1 L.Ed.2d 1403 (1957); *Atwoods Transport Lines v. U.S.* 211 F.Supp. 168 (DC DC 1962), aff. 373 U.S. 377. Any ambiguities in agency rules must be resolved against the government, regardless of practical reasons of awkward drafting. *Cole v. Young* 351 U.S. 536; 100 L.Ed. 1396 (1955). The intent of the draftsmen of a regulation is a past fact, and evidence that the regulation did not operate as it was designed to do, is inadmissible. *Dairymen's League v. Brannan* 173 F.2d 57,

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[4] These two orders purportedly became final on June 1, 1972. See Addendum pp. 3 and 4.

cert. den. 338 U.S. 825. A regulation which fails to inform the public, or misleads the public, in respect to the duties or sanctions it imposes upon them is not a valid regulation. *M. Kraus and Bros. v. U.S.* 327 U.S. 614; 90 L.Ed. 894 (1946); *Sun Oil Co. v. Burford* 130 F.2d 10 (5th Cir. 1942); *Red Lion Broadcasting Co. v. FCC* 381 F.2d 908 (DC Cir. 1967); *McKay v. Wahlenmaier* 226 F.2d 35 (DC Cir. 1955).

CONCLUSION

The requirement that the Secretary must make findings of fact respecting the occurrence of a charged violation, and the appropriate penalty for such violation, is an integral and indispensable part of the assessment function mandated by the statute. The statute requires more than just "an opportunity for a hearing"; it directs the Secretary to *determine* in each particular case whether there was in fact a violation for which the mine operator should be assessed a penalty, and, taking into consideration the six statutory criteria, how much that penalty should be.

The penalties assessed here against respondent Mears were not supported by a decision by him either as to the fact of the alleged violation or the appropriate amount of the penalty. Because of his glaring deficiency the District Court properly refused to grant enforce-

ment to such orders, and the Court of Appeals properly affirmed.

Respectfully submitted,

JOHN L. KILCULLEN
Webster, Kilcullen &
Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Respondent
Edward Mears, et al.,
d/b/a M. Y. Coal Company

ADDENDUM

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02296-0

CERTIFIED MAIL
Return Receipt Requested

April 11, 1972

MY Coal Company
11 East Pike
Indiana, Pennsylvania 15701

Re: Mine: MY No. 1

Case No: 2307-2

Attention: Rocco Yanity

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U. S. Bureau of Mines
Room 210
1725 K Street, N. W.
Washington, D. C. 20005

Failure to file a protest to the proposed assessment or request formal adjudication within the aforementioned time will be considered a waiver of your right to protest, including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying, please refer to the case number.

Payment of the assessment should be made in the form of a check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

Everett Turner
Assessment Officer

Enclosure
jd
cc:
Case File ADT Denver
Reading File MEM Files

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02296-0

CERTIFIED MAIL
Return Receipt Requested

June 1, 1972

MY Coal Company
11 East Pike
Indiana, Pennsylvania 15701

Re: Mine: MY No. 1

Case No.: 2307-2

Attention: Rocco Yanity

Proposed Order (X)
Amended Order ( )
Affirmed Order ( )

Gentlemen:

No request for formal adjudication having been filed within fifteen (15) working days of your receipt of the above-captioned matter dated April 11, 1972, you are hereby notified that the said Order has now been entered as the Final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of $1,320.00 is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

Everett Turner
Assessment Officer

cc:
ADT Denver

jd

2307-2 D-ltr 6/1/72 MY Coal Co. Rm 210 mf

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POA
Rev. 9-3-71

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02396-0

CERTIFIED MAIL

Return Receipt Requested

October 26, 1971

M. Y. Coal Company
111 East Pike
Indiana, Pennsylvania 15701

Re: Mine: M. Y. No. 1
Case No: 2307-1

Attention: Rocco Yanity, Superintendent

Send affirming Letter 12-2-71

Received 12-09-71

Gentlemen:

Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U. S. Bureau of Mines
Room 635
4015 Wilson Boulevard
Arlington, Virginia 22203

Failure to file a protest to the proposed assessment or request formal adjudication within the afore-mentioned time will be considered a waiver of your right to protest including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying please refer to the case number.

Payment of the assessment should be made in the form of check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

Everett Turner

Everett Turner
Assessment Officer

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

☐ Show to whom, date and address of delivery

☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

SIGNATURE OF ADDRESSEE OR AGENT, IF ANY

DATE OF DELIVERY

M. Y. Coal Company

BUREAU OF MINES
WASHINGTON, D.C. 20240
ID: 36-02396-0

CERTIFIED MAIL
Return Receipt Requested

June 1, 1972

Re: Mine: M. Y. No. 1
Case No.: 2307-1

Proposed Order ( )
Amended Order ( )
Affirmed Order (X

M. Y. Coal Company
111 East Pike
Indiana, Pennsylvania 15701

Attention: Rocco Yanity, Superintendent

Gentlemen:

No request for formal adjudication having been filed within fifteen (15) working days of your receipt of the above-captioned matter dated 12/20/71, you are hereby notified that the said Order has now been entered as the final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of $680.00 is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

Everett Turner

Everett Turner
Assessment Officer

2307-1 D-ltr 6/1/72 M. Y. Coal Co. Per 210 mlh

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)

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DATE OF DELIVERY

BEST COPY AVAILABLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-2[illegible]
No. 73-2066

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Petitioner

DELTA MINING INC., *et al.*, *Respondents*

NATIONAL INDEPENDENT COAL
OPERATOR'S ASSOCIATION, *et al.*, *Petitioners*

v.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, *et al.*, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit and the District of Columbia Circuit

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

GUY FARMER
WILLIAM A. GERSHUNY
FARMER, SHIBLEY, MCGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Bituminous Coal Operators' Association, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-251

No. 73-2066

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Petitioner

DELTA MINING INC., *et al., Respondents*

NATIONAL INDEPENDENT COAL
OPERATOR'S ASSOCIATION, *et al., Petitioners*

v.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, *et al., Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit and the District of Columbia Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

The Bituminous Coal Operators' Association, Inc., respectfully files this brief *amicus curiae,* with the writ-

ten consent of all parties (Appendix 1a-1c), pursuant to Rule 42 of the Rules of the Supreme Court.

I

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION

The Bituminous Coal Operators' Association, Inc. (hereinafter referred to as BCOA) is a voluntary nonprofit association of bituminous coal mine operators. It was established in 1952 out of an effort to bring a degree of stability to the labor-management relations chaos and the long and bitter strikes that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA also is the principal coal industry spokesman on matters involving health and safety under the Federal Coal Mine Health and Safety Act of 1969.

BCOA membership is open to any bituminous coal company that is signatory to the National Bituminous Coal Wage Agreement. Its membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA, therefore, has a continuing interest in the implementation and enforcement of the Federal Coal Mine Health and Safety Act of 1969, which is applicable to the mining operations of each of its members.

II

STATEMENT OF THE CASE

This brief, in support of Respondents at No. 74-521 and Petitioner at No. 73-2066, is addressed to the central issue in these cases—whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary may issue final orders assessing civil penalties against mine operators in amounts up to $10,000 per violation, without making factual findings which reflect a determination of operator liability and a considered application of the six statutory penalty criteria of Section 109(a)(1).

A. The Statutory Scheme

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act") establishes, under Titles II andd III, comprehensive interim standards for the health and safety of the 140,000 miners employed in the more than 2000 underground and surface bituminous and anthracite coal mines and empowers the Secretary of the Interior, under Title I, to promulgate new and improved health and safety standards.

Title I also establishes a number of detailed procedures, often applied cumulatively, for the enforcement of such standards by the Department of the Interior, which include:

1. *Ex parte* issuance, by a federal mine inspector, of "such orders as he deems appropriate to insure the safety of any person in the coal mine," in the event of "any accident occurring in a coal mine." Section 103(f), 30 U.S.C. 813(f). There is no provision for review of such orders under the Act's general administrative review provision. Section 105(a), 30 U.S.C. 815(a);

2. *Ex parte* issuance, by a federal mine inspector, of mine closure orders requiring the immediate withdrawal of coal miners from all or part of the mine in which the inspector finds the existence of an "imminent danger." Section 104(a), 30 U.S.C. 814(a).[1] Such orders are administratively reviewable and may be vacated, affirmed, modified or terminated, but cannot be stayed by the Secretary pending such appeal and review. Section 105(a), (b) and (d), 30 U.S.C. 815(a), (b) and (d);

3. *Ex parte* issuance, by a federal mine inspector, of mine closure orders in the event a coal mine operator fails to abate a claimed violation, whether serious or non-serious, within the time unilaterally fixed by the federal mine inspector for its abatement. Section 104(b), 30 U.S.C. 814(b). Both the order and the reasonableness of the abatement period are reviewable administratively under Section 105;

4. *Ex parte* issuance, by a federal mine inpector, of mine closure orders in the event he finds a violation of a mandatory standard and also finds it "to be caused by an unwarrantable failure of such operator to comply" with health or safety standards. Section 104(c), 30 U.S.C. 814(c). Such orders are similarly reviewable under Section 105;

5. The imposition by the Secretary of a mandatory civil penalty not to exceed $10,000 for each violation of the Act or a health or safety standard, whether serious or non-serious. Section 109(a), 30 U.S.C. 819 (a);

[1] The term "imminent danger" is defined as "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Section 3(j), 30 U.S.C. 802(j).

6. Criminal sanctions. Section 109(b)-(e), 30 U.S.C. 819(b)-(e);

7. The payment by the operator of compensation to miners idled by a mine closure order. Section 110 (a), 30 U.S.C. 820(a).

Each year federal mine inspectors issue approximately 5,000 mine closure orders and cite mine operators for approximately 80,000 violations,[2] most being technical and non-serious.

B. The Statutory Procedure for Assessment of Civil Penalties

Section 109(a)(1) provides for the mandatory imposition of civil penalties in amounts up to $10,000 for each violation of the Act or a health or safety standard, whether serious or non-serious. In determining the amount of each penalty, the Secretary is required to consider six criteria: (1) the mine operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) his ability to continue in business, (5) the gravity of the violation and (6) the operator's demonstrated good faith in attempting to abate the violation.

Section 109(a)(3) provides that each penalty "shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . . ."

[2] Page 29 of Petitioner's brief at No. 74-251.

If the penalty as assessed by the Secretary is not paid, Section 109(a)(14) authorizes the commencement of an enforcement proceeding by the Secretary in an appropriate district court. All issues, except those which were or could have been raised in judicial review proceedings under Section 106, are to be determined *de novo* and the Court is empowered to enforce, modify, set aside or remand the order. The operator has the right to have disputed factual issues submitted to a jury, but the amount of the penalty is to be fixed by the Court.

C. The Secretary's Procedures for Assessment of Civil Penalties

The Secretary's implementation of the civil penalty provisions of the Act has been marked by vacillation, confusion, uncertainty and continual procedural changes. Since March 30, 1970, when the Act became effective, four different procedures have been employed and even those were subject to constant revision:

1. *March, 1970-January 1971*

The Secretary's initial procedure, promulgated on March 28, 1970 (35 F.R. 5257), established a schedule of fixed penalties of $25, $100 and $500 for each violation depending on seriousness, with increased amounts for second, third and additional violations during any 12 month period. The amounts of the penalty for first violations during the initial six-month period of enforcement were reduced on May 7, 1970 (35 F.R. 7181).

If the scheduled amount was not paid within 30 days after the violation was detected, a formal administrative proceeding automatically was initiated by the Bureau of Mines and the case assigned to a Department Hearing Officer.

On April 30, 1970, a three-judge federal Court in the Western District of Virginia temporarily restrained the use of the penalty schedule, but otherwise permitted the assessment procedures to remain in effect.[3] As a result, formal administrative proceedings for the assessment of penalties by Department Hearing Officers were automatically initiated for each violation cited.

On November 18, 1970, the Secretary rescinded the penalty schedule and officially continued the formal hearing procedure which had been in effect since issuance of the restraining order.

2. *January, 1971-April, 1973*

On January 16, 1971, the Secretary established a new penalty assessment procedure, Part 100, 30 C.F.R., whose validity is at issue in these cases. The Part 100 regulations provided for the issuance of a proposed penalty order by a Bureau of Mines Assessment Officer. Sections 100.4(a) and 100.2(a). If the operator failed to protest the proposed order (or revised proposed order) within 15 days, he was deemed to have waived his right to a hearing and the proposed order became the Secretary's final order. Section 100.4(e).

In practice, the Bureau's Assessment Officer took the Bureau mine inspector's notice of violation as establishing a violation and made no independent determination of the fact of violation. Preprinted assessment orders, containing a "boiler plate" statement that the penalty was determined after consideration of the six statutory criteria, were utilized by the government assessment officers. However, the courts below found that

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[3] *Ratliff* v. *Hickel*, Civil Action No. 70-C-50-A.

the penalties were determined by mechanical reference to a fixed schedule, that the individual circumstances of each case were not considered, and that no findings or other records which would reflect the basis for the proposed penalty were made or retained. No additional determinations or findings of liability or the appropriateness of the penalty were made when the proposed order became the Secretary's final order.

Penalty assessment data in the record of the *NICOA* case indicates that, during the relevant period, coal mines in Pennsylvania employing from 2 to 700 miners and producing from 30 to 9500 tons per day were assessed virtually identical penalties, ranging from $5,000 to $9,000, per violation deemed to create an imminent danger.[4]

3. *April, 1973-August, 1974*

On April 24, 1973, the Part 100 procedures were suspended by the Secretary (38 F.R. 10085) following issuance of an injunction by the District Court for the District of Columbia in *NICOA* v. *Morton*, 357 F. Supp. 509.

They were replaced with what the Secretary termed "interim regulations" which provided for a formal administrative hearing in each case, with the formal proceedings being initiated automatically by the Bureau of Mines. 38 F.R. 10086-10087. The Bureau's Petition for Assessment was accompanied by a "tentative recommended penalty" which could be paid, thereby ter-

[4] This contrasts with the unsupported data referred to at page 33, fn. 44 of the Government's Brief in No. 74-521 which would tend to indicate that most civil penalties assessed under Section 109 were in amounts less than $50.00.

minating the proceeding. The mine operator's failure to make timely answer to the Bureau's petition was deemed to constitute a waiver of his right to a hearing; but the administrative law judge nevertheless was required to make factual findings as to the appropriateness of the penalty to be assessed, based on evidence introduced at an *ex parte* hearing or information supplied informally by the Bureau. 43 C.F.R. 4.544 (1973).

These "interim" regulations, which remained in effect for approximately sixteen months, were essentially identical to the formal hearing procedures in effect from April 30, 1970 to January 16, 1971.

4. *August, 1974-present*

Yet another procedure for the assessment of civil penalties under Section 109, the fourth major change in little more than four years, was initiated by the Secretary on August 1, 1974. 39 F.R. 27558. This procedure, which is currently in effect, reestablishes the use of pre-hearing penalty orders issued by assessment officers and default procedures whereby the assessment officer's order becomes the Secretary's "final order" if the mine operator fails to request a hearing. Section 100.4(c).

D. The Court of Appeals Decision in NICOA

In *NICOA* (No. 73-2066), the Court of Appeals for the District of Columbia, reversing the judgment of the District Court, construed the Act to require the Secretary to support a penalty assessment order with findings only in the event an administrative hearing is conducted. Specifically, the Court held,

> "Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the

> Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order."

The District Court had found that the proposed assessment orders contained no information as to the basis for the penalty.

E. The Court of Appeals Decision in Delta Mining

In *Delta Mining* (No. 74-251), the Court of Appeals for the Third Circuit, in a number of District Court actions brought by the Secretary under Section 109(a)(4) to collect civil penalties, expressly rejected the reasoning of the Court of Appeals in *NICOA*. It found the provisions of Section 109(a)(3) unambiguous and requiring "every final assessment order of the Secretary to be accompanied by findings of fact." While sympathizing with the Secretary's concern that a requirement of findings for each of the 80,000 violations detected annually might "hobble" effective enforcement of the Act, the Court noted that just the opposite effect could result:

> "Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings."

III

ARGUMENT

Section 109(a)(3) requires that each penalty order issued by the Secretary be accompanied by factual findings which reflect a determination of operator liability and a considered application of the six statutory penalty criteria of Section 109(a)(1).

From the outset, the efforts of the Secretary to implement the Federal Coal Mine Health and Safety Act of 1969 and the efforts of the coal industry to achieve and maintain high levels of safety have been encumbered by a common obstacle—the staggering number of violations cited by the Secretary under Section 104 of the Act.

The Secretary of Interior has chosen to construe the Act as requiring a citation and a penalty in every case regardless of how insignificant or non-serious the "violation." This is in contrast to OSHA, which specifically authorizes issuance of warning notices in many instances where citations of violations would issue under the Coal Mine Act.

The coal mine violations, cited at the rate of 80,000 a year, encompass a wide spectrum of statutory and regulatory measures, ranging from purely administrative requirements (e.g. use of sign designating mine office, Section 107(a)), to "non-serious" standards (e.g. drinking water to be supplied underground, Section 317(s)), to "serious" safety standards (e.g. periodic examinations for explosive gases, Section 303(h)). They occur in the constantly changing working environment of surface and underground coal mines, employing from one to 500 miners and producing from 20 to 10,000 tons a day.

The litigation presently before the Court resulted from an attempt of the Secretary to minimize the need for formal administrative hearings to assess penalties by the use of default procedures and from an attempt of the Bureau's Assessment Officers to avoid the administrative burden of making genuine determinations of operator liability and of an appropriate penalty. This was to be accomplished by the mechanical use of a penalty schedule with fixed dollar amounts.

It is the position of BCOA that the Secretary's penalty assessment procedures in Part 100, as written and as implemented by the Bureau's Assessment Officers, are contrary to the plain mandate of Section 109(a)(1) and (3).

A. Sections 109(a)(1) and (a)(3) Are in pari materia

The contention of the Secretary throughout has been that factual findings are not required under Section 109(a)(3) when the operator forgoes or "waives" his right to an administrative hearing. To state the issue in these terms is to confuse it, for the contention ignores the equally plain mandate of 109(a)(1) that all penalties be determined after a full consideration of the six statutory criteria.

The nature and extent of the Secretary's duty in assessing a civil penalty cannot be determined from the provisions of Section 109(a)(3) alone, but must be derived from a reading of that section in combination with 109(a)(1). The former speaks only to the form and timing of the penalty assessment order—that it contain findings which reflect a determination of operator liability and the appropriateness of the amount of the penalty and that it issue only after the operator

is afforded the opportunity for a hearing. The latter, Section 109(a)(1), requires that each penalty be determined individually after a consideration of the six statutory factors and reflects a clear congressional purpose of insuring that the amount of the monetary penalty be appropriate under all the circumstances of the case.[5] It is this Section 109(a)(1) obligation that was flagrantly ignored by the Secretary's delegates in carrying out their responsibilities under Part 100 and under the Act. The record in each case now before the Court clearly reflects that the Bureau's assessment officers not only made no determination of liability, but gave no consideration to the six factors in determining the amounts of the proposed penalties which ultimately became the final orders of the Secretary. Indeed, that was the finding of the District Court and we do not understand the Secretary to challenge those findings.[6] Thus, penalties were assessed without regard to the liability of the operator, the size of the business, the negligence of the operator or any other of the criteria designed to insure that the amount of the penalty is appropriate under all the circumstances of the particular case. In this regard, the assessment officers ignored the clear mandate of the Act.

The error of the Court of Appeals in *NICOA* apparently stemmed from the Court's assumption that

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[5] Substantially identical criteria govern the assessment of penalties under the Occupational Safety and Health Act of 1970. Section 17(i).

[6] Appellate counsel's efforts (at pp. 34 and 32, fn. 43 of Secretary's brief in *Delta Mining*) to supply the *ratio decidendi*, where the record of the Secretary is silent, clearly is improper. *Federal Power Commission* v. *Texaco, Inc.*, —— U.S. ——, 94 S. Ct. 2315 (1974); *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

the preprinted "proposed" order which ultimately became the "final" order was in fact the product of a considered application of the 109(a)(1) criteria. The Court stated:

> "Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision *which merely would consist of the same information already contained in the proposed assessment order.*" (Underscoring added).

The Court's assumption was misplaced, of course, in view of the District Court's findings (fully supported by the record) as to the lack of any such consideration, in the so-called "formal decision," of the penalty criteria and the absence of any articulation of the manner in which these criteria were applied.[7]

Reading the provisions of Sections 109(a)(1) and (a)(3) together, as we think we must, the contention of the Secretary that the mine operator waives his right to factual findings when he gives up the right to a formal hearing is clearly revealed as mistaken. The failure of the operator to request a hearing under 109(a)(3) has no effect whatever on the obligation of the Secretary to determine an appropriate penalty in the first instance under 109(a)(1) using the six statutory criteria. The 109(a)(1) requirement of factual finding and the 109(a)(3) requirement of an opportunity for

[7] Recent decisions of the Court of Appeals for the District of Columbia faulting agency failure to articulate reasons for administrative actions make it inconceivable that the Court of Appeals would have sanctioned the issuance of a *pro forma* penalty assessment order where factual findings never had been made and absolutely no record existed from which to determine agency reasoning. *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F.2d 925 (C.A. D.C. 1974) and cases cited therein.

a formal hearing are independent requirements. The waiver of one cannot be taken as a waiver of the other.

Since the "proposed" penalty assessment orders issued under Part 100 were defective for want of factual findings or administrative record which would reflect a considered application of the criteria of (a)(1), they were incapable of achieving "final" order status for purposes of enforcement under 109(a)(4).

The Secretary nevertheless argues that a requirement of factual findings to support each penalty assessed "merely imposes an unnecessary administrative burden" on the Department (pp. 34 and 29, Petitioner's brief in *Delta Mining*).[8]

Wholly apart from the fact that such reasoning ignores the procedural requisites of 109(a)(1) and 109(a)(3) and raises other serious questions of constitutional proportions,[9] two complete answers immediately are apparent.

First, a showing of an administrative burden cannot operate to relieve the Secretary of statutory requirements.

Second, the administrative burden of coping with the volume of penalty assessments is one which is largely

[8] The Secretary attempts to finesse the legal issue by suggesting that the amounts involved in these cases are *de minimus*. Of course, what is *de minimus* to one operator may spell financial disaster to another, particularly when one considers the cumulative effect of the enforcement measures in general and the penalties in particular.

[9] Cf. *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972):

> "Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the persons whose possessions are about to be taken."

of the Secretary's own making. The large backlog of cases is due in large part to the indecision, bad judgment and vacillation of the Secretary in constantly changing penalty assessment procedures. Moreover, as the Court of Appeals in *Delta Mining* reminded the Secretary, the probability is great that fewer penalties would have been contested had the decision of the Secretary fixing the penalty evinced a genuine consideration of the circumstances and relevant factors bearing on the amount of the penalty. Perhaps even more important, the "burden" of the penalty assessment program could easily be eliminated through a selective enforcement program which concentrates on the more serious violations and reflects concepts of fault.

B. The Trial de novo Rights of 109(a)(4) Do Not Cure Agency Disregard of 109(a)(1) and 109(a)(3) Requirements

In seeking support of his contention that final penalty assessment orders need not be accompanied by findings or even a record from which the bases of his decisions can be gleaned, the Secretary suggests that the *de novo* trial provisions of Section 109(a)(4) somehow cure the Assessment Officer's disregard for the mandates of 109(a)(1) and (3). Thus the Secretary argues:

> "It is hardly apparent that the operator suffers any prejudice by the lack of findings in this situation, and the general rule is that procedural defects at one level are not fatal when *de novo* review is available at another level." Petitioner's Brief, p. 23, in *Delta Mining*.

Carrying this line of reasoning but one step further, the Secretary presumably would next urge this Court to approve a denial of an operator's request for an administrative hearing under 109(a)(3) on the ground that

even this procedural "flaw" would be cured by a trial *de novo* in the district court.

Such a contention must also be rejected for the reason that Section 109(a)(4) does not provide for the traditional trial *de novo*. The Court of Appeals in *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, relied upon at page 23 of the Secretary's Brief in *Delta Mining*, aptly describes the characteristics of a true *de novo* trial:

> ". . . such a trial contemplates what the term implies, a trial anew of the entire controversy, including the hearing of evidence, as though no previous action had been taken." 171 F.2d at 178.

However, none of those characteristics are present in 109(a)(4) enforcement proceedings in district court. The "record" of the administrative proceeding under Section 109 becomes a part of the record in the district court and the court is empowered to enforce, modify, set aside or remand the administrative penalty order. Moreover, the statute expressly states that the District Courts may not consider and determine factual issues "which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of the Act." The restrictive effect of the statutory provisions has not yet been judicially determined, but it obviously is a limitation of some significance. In short, while its exact parameters have yet to be determined by the courts, Section 109(a)(4) on its face demonstrates that these so-called *de novo* proceedings in the District Court are not so all-encompassing as described by the Secretary, and even if they were this is irrelevant to the issue in the cases.

C. The Default Procedures of the Secretary's Regulations Conflict with the Act

In support of the practice of issuing final penalty orders without determining operator liability, without regard to the several criteria of 109(a)(1) and without appropriate factual findings, the Secretary postulates that "Congress did not intend to modify the general rule that administrative disputes may be effectively resolved, without a hearing or findings of fact, by express settlement or by reasonable default procedures."[10] This innocent-appearing statement, however, fails to make some rather critical distinctions:

1. Insofar as it deals with the question of agency authority to compromise and settle civil penalty cases, it interjects an issue not raised in either case. Indeed, we do not understand any party to challenge this basic authority of the Secretary and BCOA has in the past on several occasions urged him to utilize it more extensively to reduce the huge backlog of penalty assessment cases.

2. "Compromise" and "default" are not synonymous terms, as the Secretary appears to suggest.[11] The former signifies agreement of the parties, while the latter, as pointed out by the Court of Appeals in *Delta Mining,* suggests only a lack of desire or an inability (due, perhaps, to cost, inconvenience or other considerations) to engage in formal litigation. Certainly there is nothing in the Secretary's admitted authority to compromise penalty proceedings from which to infer the authority to ignore the six statutory criteria of 109(a)(1) in a case where formal hearing is waived.

[10] P. 34, Petitioner's brief in *Delta Mining.*

[11] P. 36, Petitioner's brief in *Delta Mining.*

3. Had Congress intended to authorize default procedures prior to the initiation of administrative proceedings, it would have done so in explicit terms as it had done, one year later, in the Occupational Safety and Health Act of 1970. Section 10(a) of that Act expressly provides for the issuance of proposed penalty orders by the Secretary of Labor and for the proposed order to become final upon failure of the employer to contest it within 15 working days. Here, the Secretary attempted to supply by administrative fiat a procedure not sanctioned by Congress in this statute. No one questions that the Secretary need not hold a formal Administrative Procedure Act-type of hearing where the mine operator waives such a hearing. But that does not excuse the Secretary from compliance with the entirely independent statutory requirements that he make findings of fact which reflect a determination of operator liability and a considered application of the six criteria in every case.[12]

[12] Indeed, Rule 55(b)(2) of the Federal Rules of Civil Procedure requires an appropriate hearing, in the event of default, to determine damages and Rule 52 requires factual findings where the damage issue is tried to the court.

IV

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals in *Delta Mining* should be affirmed and the decision of the Court of Appeals in *NICOA* should be reversed.

Respectfully submitted,

GUY FARMER

WILLIAM A. GERSHUNY
FARMER, SHIBLEY, MCGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Bituminous Coal Operators' Association, Inc.

APPENDIX

APPENDIX

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

February 3, 1975

Guy Farmer, Esq.
Farmer, Shibley, McGuinn & Flood
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: National Independent Coal Operator's Association v. Morton, No. 73-2066, October Term, 1974

Morton v. Delta Mining Co., No. 74-251, October Term, 1974

Dear Mr. Farmer:

As requested in your letter of January 30, I hereby consent to your filing a brief amicus curiae in the above-entitled cases on behalf of The Bituminous Coal Operators Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

FRED BLACKWELL
ATTORNEY AT LAW

1707 H STREET NW—SUITE 607—WASHINGTON, D.C. 20006
(202) 298-6344 (301) 926-8131

February 10, 1975

Guy Farmer, Esquire
Farmer, Shibley, McGuinn and Flood
1120 Connecticut Avenue, N.W.
Suite 850
Washington, D.C. 20036

Re: *NICOA* v. *Morton*, Supreme Court No. 73-2066, and *Morton* v. *Delta Mining, Inc.*, Supreme Court No. 74-521

Dear Guy:

In response to your recent request, and on behalf of Delta Mining, Inc., and G. M. W. Inc. in the above, I consent to the filing of an *amicus curiae* in the above by the Bituminous Coal Operators Association.

Sincerely,

/s/ FRED BLACKWELL
Fred Blackwell

cc: Robert H. Bork, *Solicitor General*

LAW OFFICES
WEBSTER, KILCULLEN & CHAMBERLAIN
1747 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

February 3, 1975

Guy Farmer, Esq.
Farmer, Shibley, McGuinn and Flood
1120 Connecticut Avenue, N.W.
Suite 850
Washington, D.C. 20036

Re: *NICOA* v. *Morton*
Morton v. *Delta Mining, Inc.*

Dear Guy:

In response to your letter of January 30, 1975 we herewith consent, on behalf of petitioner National Independent Coal Operator's Association in No. 73-2066, and respondent Edward Mears, et al in No. 74-521, to the filing of an *amicus curiae* brief by the Bituminous Coal Operators Association.

With kindest regards,

/s/ JOHN L. KILCULLEN
John Kilcullen

cc: Frederick R. Blackwell, Esq.
Robert H. Bork, Solicitor General

Supreme Court, U. S.
FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-521

ROGERS C. B. MORTON, Secretary of the Interior,
Petitioner,

v.

DELTA MINING, INC., G. M. & W. COAL COMPANY, INC., AND EDWARD MEARS ET AL. d/b/a M. Y. COAL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

JOSEPH A. YABLONSKI
DANIEL B. EDELMAN
PAUL R. HOEBER
STEVEN B. JACOBSON
900 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Amicus

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BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

INTRODUCTION

The United Mine Workers of America presents this brief in support of the petitioner with the consent of counsel for both the petitioner and the respondents.

INTEREST OF AMICUS

The United Mine Workers of America is a labor union representing over 120,000 coal miners in 23 states. As such,

the UMWA is the collective bargaining representative of the great majority of the nation's coal miners, and is their chief spokesman in matters in.olving their health and safety. The UMWA is therefore extremely interested in strong and effective enforcement of the Federal Coal Mine Health and Safety Act of 1969, which was enacted for the purpose of protecting the health and safety of the nation's coal miners.

ARGUMENT

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 *et seq.*, became law on December 30, 1969. A monument to 78 coal miners needlessly killed in the 1968 explosion of Consolidation Coal Company's Mountaineer No. 9 Mine at Farmington, West Virginia,[1] and to the more than 100,000 American coal miners who have been killed in coal mines during our nation's history, the Act declared that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner." Section 2(a), 30 U.S.C. §801(a). Congress found that there was "an urgent need to provide more effective means and measures for improving the working conditions and practices in the nation's coal mines in order to prevent death and serious physical harm." Section 2(c), 30 U.S.C. §801(c).

Congress sought to curb the slaughter in the nation's coal mines by requiring coal mine operators to observe a number of mandatory health and safety standards. Interim standards were included in Titles II and III of the Act itself, 30 U.S.C. §§841-878, while Section 101 of the Act (30 U.S.C. §811) set up procedures for administrative promulgation of improved standards in the future. Federal inspectors were granted the right to enter and inspect all coal mines, and required to do so at least four times per year.

[1] As distinguished from the 1954 explosion at the same mine, which killed 16.

Section 103, 30 U.S.C. §813. The inspectors were ordered to close mines or areas of mines in certain circumstances. Section 104, 30 U.S.C. §814. And to deter operators from violating the Act and the mandatory safety standards, the Secretary was ordered to assess civil fines for all violations that his inspectors found. Section 109, 30 U.S.C. §819.

The history of the civil penalty provisions of Section 109 is not an impressive one. Put simply, the administration of the penalty provisions has been an unmitigated disaster, with relatively few of the required penalties ever having been collected.[2] The overwhelming number of unsafe and unlawful practices in the nation's mines (over 80,000 found per year), together with the apparent unwillingness of many coal operators to obey the law, has placed an impossible burden upon an Interior Department that is relatively understaffed compared to the massive number of violations with which it must deal. As a result, huge numbers of violations are repeated over and over again, undeterred by the statutory penalty scheme.

The Court of Appeals has now interpreted the Act's penalty provisions in a manner that will require reprocessing of an estimated 24,000 individual penalty assessments from past years, and that may substantially affect the Department's ability to deal summarily with small, uncontested assessments in the future. This is hardly desirable, and is wholly unnecessary. Amicus submits that the Court of Appeals misinterpreted the statute, and that its decision should therefore be reversed. Further, even if this Court were to adopt the Court of Appeals' interpretation, this Court's decision need not be so sweeping as that of the Court of Appeals' and consequently need not place so great a burden upon the Interior Department's enforcement mechanisms.

[2] See, *e.g.*, "Enforcement of Federal Mine Health and Safety Laws," Hearing Before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Congress, 1st Sess. (Oct. 31, 1973).

I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

The UMWA believes that Judge MacKinnon's opinion in the companion case, No. 73-2066, and particularly his discussion of the legislative history of the penalty provisions, amply demonstrate why the Third Circuit's interpretation of the penalty provisions in this case is erroneous. In support of that discussion, the UMWA would add only that the District of Columbia Circuit's interpretation of the statute is the same as that of the Secretary of the Interior, and that this Court has frequently observed that where "the officers or agencies charged with administration" of a statute have interpreted it, the courts are to "show . . . deference to [that] interpretation." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). A court "need not find" that the administrative officer's interpretation "is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings. . . ." *Unemployment Commission of Alaska* v. *Aragon,* 329 U.S. 143, 153 (1946). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *Power Reactor Development Co.* v. *IUE,* 367 U.S. 396, 408 (1961).

It is also important, however, that this Court be aware that it need not even reach the statutory interpretation question. For the Court of Appeals' decision should be reversed because the respondents failed to exhaust their administrative remedies and, in addition, because they have a right to de novo reconsideration of the penalties assessed against them in federal district court.

When the respondents decided to allow the Assessment Officers' proposed orders to become final without further protest, *they knew* that they were thereby waiving *both* a

hearing *and* a decision incorporating complete findings of fact. They had been so informed by regulations published in the Federal Register, and by direct communications sent to them by the Assessment Officers. At that point, they could have taken a number of different steps that would have informed the Interior Department of their objections to the form of the Assessment Officers' orders, and would have allowed the Department to consider their objections administratively before their cases reached federal court. But the respondents did nothing of the kind. Instead, they just sat mute, choosing to wait and spring their objections on the Department only after the assessments against them had wound their way over to the Justice Department and into federal district court, and only after the Department had made additional thousands of assessments under the procedures the respondents presumably intended to challenge all along.

Rather than rolling over and playing dead, the respondents could have taken any one of several possible steps upon receipt of the Assessment Officers' orders. They could, for example, have requested the Assessment Officers to reconsider their orders or the form of their orders, pointing out that respondents believed that such orders had to contain more complete findings of fact. Or they could have filed administrative appeals, noting that while hearings were not desired, formal findings of fact were, and further noting that the respondents believed that they were entitled to findings of fact even in the absence of a hearing. Or, finally and most importantly, the respondents could have requested that the Department indeed hold hearings, while at the same time advising the Department that they did not wish to appear. They would thereby have required Interior's enforcement branch to present its cases *ex parte* to Administrative Law Judges for de novo review and preparation of complete findings of fact, even though they themselves did not intend to be at the hearings.

Although this last procedure may sound a bit odd, it is precisely the same procedure that the petitioner in the companion case, No. 73-2066, would require for all penalty assessments whether requested or not.[3] In fact, Interior Department Administrative Law Judges have held hundreds of such proceedings each year under the regulations. A request for a hearing is all that is necessary to put the enforcement branch to its burden of proof in a de novo administrative penalty review proceeding from which complete findings of fact will emerge, and an operator's failure to appear at a requested hearing is in no way considered to be a surrender by the operator.[4] Thus, all the respondents had to do to obtain complete findings of fact was to file a request for a hearing, a hearing they were perfectly free not to attend!

In addition, the UMWA would reiterate the general rule that procedural defects at one level of a proceeding are not fatal where de novo review is available at another level. *Pittsburgh S.S. Co.* v. *Brown,* 171 F.2d 175, 178 (C.A. 7, 1948), and *Jordan* v. *American Eagle Fire Insurance Co.,* 169 F.2d 281, 290 (C.A.D.C., 1948); *cf. Colten* v. *Kentucky,* 407 U.S. 104, 112-19 (1972). The Court of Appeals held that the assessment orders here were invalid because they did not contain findings of fact as to the six statutory assessment criteria. Yet under Section 109(a)(4) of the Act, 30 U.S.C. §819(a)(4), the district court was required to "consider and determine de novo all relevant issues" before the Secretary's assessment orders could be enforced.

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[3] See p. 8, *infra.*

[4] The Court of Appeals attempted to distinguish the cases presented to it from the one presented to the District of Columbia Circuit by asserting that the respondents here may have chosen to waive a hearing and findings of fact because they did not wish to go to the expense and inconvenience of attending a formal hearing. 495 F.2d at 44. But since such attendance is unnecessary, the only "expenses" and "inconveniences" that would have actually been required were those of filing a simple notice of appeal.

II. IF THE DECISION OF THE COURT OF APPEALS IS NOT REVERSED, THIS COURT SHOULD NARROW THE SCOPE OF THE REMEDIAL ACTION REQUIRED.

If this Court should determine that the Court of Appeals' interpretation of the statutory penalty provisions is correct, its decision need not place as great a burden upon the Interior Department as would result from simple affirmance. The Court of Appeals partially misunderstood the nature of the Secretary's final assessment orders in the instant case, and for that reason its decision is broader than is necessary to effectuate its interpretation of the statute.

The Court of Appeals believed that "[t]he final orders entered [here] by the Secretary did not mention the six statutory [assessment] criteria at all, but merely set forth the Secretary's finding that a violation 'did, in fact, occur.'" 495 F.2d at 40. However, the Secretary's final assessment orders certainly must be considered as incorporating the federal mine inspectors' original violation notices, and the orders terminating them.[5] Like all other violation notices and orders issued under the regulations here in question, the inspectors' notices and orders not only contained findings describing the violations found,[6] but also contained express findings as to, in the words of Section 109(a)(1) of the Act, "whether the operator was negligent,"[7] "the gravity of the

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[5] Section 109(a)(4) refers only to a "decision *incorporating* findings of fact therein" [emphasis added]. 30 U.S.C. §819(a)(4).

[6] Thus, the findings that violations actually occurred were not "originally made by the Assessment Officer," 495 F.2d at 40n.10, but rather were made by trained mine safety experts based upon their own eyewitness observations at the actual times the violations occurred.

[7] Where violations are the result of the "unwarrantable failure" of an operator to comply with the Act, the required notices or orders are issued under Section 104(c) of the Act, 30 U.S.C. §814(c). If, as here, "unwarrantable failure" is not found, notices or orders are issued under other sections, which are also clearly noted.

violations,"[8] and "the demonstrated good faith of the operator . . . in attempting to achieve rapid compliance after notification of a violation."[9] Consequently, assuming that the Court of Appeals' interpretation of the statutory penalty provisions was correct, the only deficiency in the final assessment orders here was that they did not contain findings as to the respondents' history of previous violations, the appropriateness of the size of the penalties, and the effect of the penalties on the respondents' ability to continue in business. This deficiency could be remedied by ordering that the Assessment Officers supplement their orders by findings of fact as to these three criteria.

It should further be noted that the Assessment Officers would be the proper persons to make these supplemental findings. The petitioner in the companion case, the National Independent Coal Operators Association, has publicly claimed that the Court of Appeals' decision in this case requires not only that complete findings of fact accompany any final penalty assessment by the Secretary, but that such findings must be made by Administrative Law Judges and cannot be made by other representatives of the Secretary (*e.g.*, mine inspectors or assessment officers). See 39 Fed. Reg., 27559 (July 30, 1974). This assertion, of course, is farfetched and frivolous, although it will undoubtedly be raised in hundreds of district court cases if not firmly disposed of here. The statute refers only to findings of fact by "the Secretary" of the Interior, and mine inspectors and

[8] Where an inspector finds that a violation has created an "imminent danger," he issues a withdrawal order under §104(a) of the Act (30 U.S.C. §814(a)), which [order] states that an imminent danger has been found and indicates that the order is indeed a Section 104(a) order. If, as here, there is no imminent danger, notices or orders are issued under other sections, with the sections in question clearly indicated.

[9] The notices of violation all indicate a period of time allowed for achieving good faith compliance with the safety standards, while the termination notices indicate whether such compliance was achieved.

assessment officers clearly are representatives of the Secretary. Furthermore, the respondent here had a right to findings by a law judge under the regulations, and simply elected not to exercise it.

CONCLUSION

Amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

JOSEPH A. YABLONSKI
DANIEL B. EDELMAN
PAUL R. HOEBER
STEVEN B. JACOBSON
900 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Amicus

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